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No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.,
Appellants,

v.

THE BEER INSTITUTE, et al,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

WILLIAM A. WECHSLER
BAILEY AND WECHSLER
Counsel of Record
(A Member of the Bar
of the U.S. Supreme Court)

ALFRED F. WECHSLER
GREGORY J. SOUTHWORTH
BAILEY AND WECHSLER

66 Forest Street
Hartford, CT. 06105
Telephone: (203) 525-9191

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QUESTIONS PRESENTED

1. Does the Twenty-First Amendment sanction the State of Connecticut's Liquor Control Act including its affirmation provisions?

2. Are Connecticut's amended beer affirmation provisions constitutional under the Commerce Clause?

3. Did the Court of Appeals for The Second Circuit err in reversing the U.S. District Court for the District of Connecticut's September 15, 1987 decision which upheld the constitutionality of Connecticut's amended beer price affirmation provisions?

PARTIES

The parties in this action are as follows:

Appellants

JOHN F. HEALY and DAVID L. SNYDER, as Commissioners of the Department of Liquor Control; and CHARLES KASMER, as Secretary of the Department of Liquor Control.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC., as an association, and on behalf of its following members selling alcoholic liquor in the State of Connecticut:

JOHNNY BARTON, INC.; THE BRESCOME DISTRIBUTORS CORPORATION; CONNECTICUT DISTRIBUTORS, INC.; EDER BROS., INC.; GALLO WINE MERCHANTS INC.; ALLAN S. GOODMAN, INC.; and HARTLEY & PARKER LIMITED, INC.

Appellees

THE BEER INSTITUTE (formerly named UNITED STATES BREWERS ASSOCIATION, INC.) as an association, and on behalf of its following members selling beer in the States of Massachusetts, New York and Rhode Island:

Anheuser-Busch Inc., Miller Brewing Company, Latrobe Brewing Company, Pabst Brewing Company, The Stroh Brewery Company.

ANHEUSER-BUSCH, INC.; G. HEILEMAN BREWING COMPANY; THE GENESEE BREWING COMPANY, INC.; MILLER BREWING COMPANY; ALL BRAND IMPORTERS, INC.; DRIBECK IMPORTERS, INC.; GUINESS-HARP CORP.; LABATT IMPORTERS, INC.; MARTLETT IMPORTING COMPANY, INC.; MONTEREY BAY COMPANY, INC.; and VAN MUNCHING COMPANY, INC.

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The opinion of the United States Court of Appeals for the Second Circuit is reported in ____F.2d____ and a copy is attached hereto in Appendix A at page 1A. The earlier opinion of the United States District Court for the District of Connecticut is reported in 669 F. Supp. 543 and a copy is attached hereto in Appendix B at page 17A.

JURISDICTION

This case is an appeal from a Judgment of the United States Court of Appeals for the Second Circuit entered on June 13, 1988, which reversed the Ruling and Final Judgment of the United States District Court for the District of Connecticut dated September 15, 1987. A copy of the judgment of the District Court for the District of Connecticut is attached hereto in Appendix C at page 38A. The District Court had granted, pursuant to Fed.R.Civ. 56, Appellants' Motion for Summary Judgment, and had denied Appellees' Cross-Motion for Summary Judgment by holding that the Connecticut beer price affirmation provisions contained within the Connecticut Liquor Control Act, Conn. Gen. Stat. Sections 30-63a(b), 30-63b(b) and 30-63c(b), do not violate the Commerce Clause of the United States Constitution, U.S. Const. Art. I, Section 8, cl 3.

On Appeal, the United States Court of Appeals for the Second Circuit reversed and remanded the matter on June 13, 1988, finding that the Connecticut beer price affirmation statute, on its face, violated the Commerce Clause of the United States Constitution. A Notice of Appeal was filed by Appellants Wine and Spirits Wholesalers of Connecticut, Inc. in the U.S. Court of Appeals in New York, New York, on July 7, 1988. A copy of this Notice is attached hereto in Appendix D at page 39A.

The jurisdiction of the Supreme Court to hear this case on direct appeal rests upon 28 U.S.C. Sec. 1254 (2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .

U.S. Const., Art. I, Sec. 8, cl. 3

THE TWENTY-FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION:

The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const., Amend. XXI, Sec. 2

THE BEER PRICE AFFIRMATION PROVISIONS OF THE CONNECTICUT LIQUOR CONTROL ACT:

No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer as defined in section 30-1, at a bottle, can or case price, or price per keg, barrel or fractional unit thereof, higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

Con. Gen. Stat. Sec. 30-63a(b)[1]

At the time of posting of the bottle, can, keg or barrel and case price required by section 30-63, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the Department of Liquor Control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that, at the time of posting, the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees is no higher than the lowest price at which each such item of beer is sold, offered for sale,

---

[1] Conn. Gen. Stat. Section 30-63a(b) was ruled to be repealed by implication in a Declaratory Ruling by the Connecticut Department of Liquor Control. See *Healy II*, ____F.2d____, App. A, p. 6A.

shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

Conn. Gen. Stat. Section 30-63b(b)

In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered at the time of posting by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any such wholesaler; provided that differentials in price which make only due allowance for differences in state taxes and fees and for the actual cost of delivery are permissible. As used in this section, the term "actual cost of delivery" shall mean those expenses incurred by such manufacturer or out-of-state shipper in delivering the item of beer to the wholesaler from the point of origin to the point of destination, the term "point of origin" shall mean the location which has been established through course of dealing as the geographic location from which the wholesaler has been charged by the manufacturer or out-of-state shipper for costs of transportation, notwithstanding the fact that the item of beer may have been manufactured or bottled at, or shipped from, a different geographic location, the term "point of destination" shall mean the location which has been established through course of dealing as the geographic location at which the wholesaler takes delivery of the item of beer, the term "state taxes and fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon a gallon or liter of such alcohol and spirits of each barrel, or fractional unit thereof, of beer and the term "gallon" shall mean one hundred twenty-eight fluid ounces and the term "liter" shall mean one thousand milliliters and the term "barrel" means not less than twenty-eight nor more than thirty-one gallons. A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes and

packages, approved by the Department of Liquor Control, of his brand which he offers to any wholesaler in any state bordering this state.

Conn. Gen. Stat. Section 30-63c(b)

THE PRICING PROVISIONS ALLOWING OUT-OF-STATE CHANGES:

This section shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any time during the calendar month covered by such posting.

Conn. Gen. Stat. Section 30-63b(e)

THE POSTING PROVISIONS OF THE CONNECTICUT LIQUOR CONTROL ACT:

Each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department, on a monthly basis, the bottle, can and case price, and for beer, the price per keg or barrel or fractional unit thereof, of any brand of goods offered for sale in Connecticut, which price when so posted shall be the controlling price for such manufacturer, wholesaler or out-of-state permittee for the month following such posting. Notice of all manufacturer, wholesaler and out-of-state shipper permittee prices shall be given to permittee purchasers by direct mail or advertising in a trade publication having circulation among the retail permittees except a wholesaler permittee may give such notice by hand delivery.

Conn. Gen. Stat. Section 30-63(c)

STATEMENT OF CASE

This case involves Appellees' fourth assault against certain price affirmation provisions of the State of Connecticut's Liquor Control Act. Appellees are collectively both a trade association now known as the Beer Institute (an industry-wide association of thirty-nine domestic brewers and twenty-three importers of beer, formerly the United States Brewers Association, Inc.), and individual brewers and importers, some of whom are licensed as out-of-state shippers to sell beer to wholesalers in the State of Connecticut. Appellants are Commissioners and the Secretary of the Connecticut Department of Liquor Control and the Wine & Spirits Wholesalers of Connecticut, Inc., an association of seven companies that are licensed to sell alcoholic liquor on a wholesale basis in the State of Connecticut.

The beer price affirmation provisions of the State of Connecticut Liquor Control Act, Conn. Gen. Stat. Sections 30-63a(b), 30-63b(b), and 30-63c(b) were first enacted by the Connecticut General Assembly in 1981 in Public Act 81-294. In 1984, the Connecticut General Assembly amended the State's beer price affirmation provisions in Public Acts 84-332 and 84-432. A copy of Public Acts 84-332 and 84-432 are attached hereto in Appendix E at page 42A. The declared purpose and ultimate result of Public Act 84-332 was to conform Connecticut's beer price affirmation provisions to the U.S. Supreme Court standard as enunciated in *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 284 U.S. 35 (1966), and as modified by the U.S. Court of Appeals Second Circuit's decision in *U.S. Brewers Association v. Healy,* 692 F.2nd 275 (2d Cir. 1982), *affirmed per curiam,* 464 U.S. 909, (1983) (hereinafter, "*Healy I*").

Rather than requiring out-of-state brewers and importers to certify that their prices "will be" no lower in any of the border states during the month following the posting of prices in Connecticut, the new statute simply requires that at the time of posting the "prices charged to Connecticut wholesalers are *no higher than the lowest price then being charged in any border state.*" [emphasis added] *United States Brewers Association v. Healy* (hereinafter "*Healy II*"), 669 F. Supp. 543, 547 (D. Conn. 1987), *rev'd,* ____F.2d____ (2d Cir. 1988).

The Commissioners of Connecticut's Department of Liquor Control, by affidavit and Declaratory Ruling issued pursuant to Conn Gen. Stat. Section 4-176, have further restricted the State's beer affirmation provisions. The Ruling made clear that whatever the interpretation of Section 30-63a(b), out-of-state shippers, in this case brewers, need only affirm that at the time of posting in Connecticut (and *only* at the time of posting), their prices to Connecticut wholesalers are no higher than in the border states. *See Healy II,* ____F.2d at ____; App. A at p. 6A.

The beer industry in Connecticut consists of three marketing levels: (1) brewers and importers; (2) wholesalers; and (3) retailers. A participant at any of the levels must hold a valid Connecticut license to sell within the State alcoholic beverages to the tier below, and ultimately to the consumers. *Healy II,* 669 F. Supp. at 545-46.

Appellee licensees have contended that prices charged in package configurations offered to wholesalers in Connecticut and the bordering states vary in the several markets in Connecticut and its three bordering states. However, realistically in regard to interstate "competition," there is no appropriate vehicle for a wholesaler in one state to compete against a wholesaler in another state due to the nature of the national liquor distribution system under the Twenty-First Amendment and more particularly the three-tier system established independently by Connecticut and its three border states.

Moreover, Connecticut retailers, particularly near its borders, face substantial competition from retail beer outlets in the bordering states. Prices charged to Connecticut wholesalers are neither the highest nor the lowest in the four-state region. Nevertheless, as a result of higher wholesale prices, retail prices have been historically higher in Connecticut and many Connecticut residents have therefore purchased beer at lower retail prices by travelling to New York, Massachusetts or Rhode Island. *Healy II,* 669 F. Supp. at 546.

Beer sales in the states bordering Connecticut are regulated differently, although no less stringently, than those in

Connecticut. Although there has been no evidence or argument in any of the three proceedings previously brought by Appellees relative to the comparative stringency of liquor laws in Connecticut as opposed to its bordering states, there are certain provisions in the border states that are considerably more stringent than similar provisions in Connecticut.

The fact that those licensees who choose to do business in any of the fifty states under the Twenty-First Amendment must conform to the criteria established to become a licensee in each state is the backdrop against which this litigation has proceeded. Connecticut's affirmation provisions are significantly less restrictive than those in so-called "control states" where the state is in charge of importation, wholesaling, establishment of prices and distribution. Moreover, the sale of alcoholic liquors under the Twenty-First Amendment is a privilege and not a right. *See Hostetter v. Idlewild Liquor Corp.* (hereinafter "*Hostetter*"), 377 U.S. 324, 330 (1964).

On July 25, 1984, Appellees filed a challenge in the United States District Court for the District of Connecticut to contest certain provisions of Connecticut's Liquor Control Act as revised by the state legislature in accordance with the decision in *Healy I.* In their complaint, Appellees alleged that the statute violated the Commerce Clause.

On August 30, 1984, Appellants answered and filed a Motion for Summary Judgment, noting that the revised Connecticut statute was drafted in accordance with the decision of the District Court of Appeals in *Healy I.*

Appellees opposed Appellants' Motion For Summary Judgment and filed a Cross-Motion For Summary Judgment on February 13, 1985.

On September 19, 1984, the Wine & Spirits Wholesalers of Connecticut, Inc., filed a motion to intervene in the District Court action, based on the fact that the beer price affirmation provisions challenged by the Appellees were substantially similar in language and effect to Connecticut's affirmation

provisions pertaining to alcohol and spirits. Said motion to intervene was granted and subsequently on February 13, 1985, Intervenor-Appellants filed a memorandum in support of Appellants' Motion for Summary Judgment.

On September 11, 1987, the District Court granted Appellants' Motion for Summary Judgment and denied Appellees' Motion for Summary Judgment. Appellees filed a notice of appeal on October 13, 1987.

On June 13, 1988, the United States Court of Appeals for the Second Circuit reversed the decision of the District Court. A Notice Of Appeal was filed by Appellants John F. Healy, et al on June 29, 1988 and by Appellants Wine and Spirits Wholesalers of Connecticut, Inc. on July 7, 1988.

THE QUESTIONS ARE SUBSTANTIAL

For the following reasons, Appellants, Wine & Spirits Wholesalers of Connecticut, Inc., respectfully submit that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

I. THE TWENTY-FIRST AMENDMENT SANCTIONS CONNECTICUT'S LIQUOR CONTROL ACT INCLUDING ITS AFFIRMATION PROVISIONS.

The second section of the Twenty-First Amendment provides that "the transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The Twenty-First Amendment makes the sale of liquor in any state a privilege bestowed by the state. A state may even completely prohibit the sale and consumption of alcoholic beverages within its borders. Moreover, such a prohibition would not violate the Commerce Clause. *Hostetter* at 330.

Furthermore, the Court has stated that it is well established that a state has broad power under the Twenty-First Amendment "to regulate the times, places and circumstances under which liquor may be sold", *New York State Liquor Authority v. Bilanca*, 452 U.S. 714 (1981); *See also Duran v. Salem, Inc.*, 422 U.S. 911 (1975); *Zifferin, Inc. v. Rives*, 308 U.S. 132 (1939); *California v. LaReau*, 409 U.S. 109 (1972). Furthermore, as the Supreme Court observed in *Craig v. Boren*, 429 U.S. 190 (1976), "this court's decision . . . (has) confirmed that the (Twenty-First Amendment) primarily created an exception to the normal operation of the Commerce Clause," *Id.* at 206.

As noted in the District Court's decision, Section 2 of the Twenty-First Amendment "grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Healy II*, 669 F. Supp. at 549; *See also California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Thus, as the District Court correctly concluded, because a state may entirely exclude alcoholic beverages from its markets, less restrictive forms of regulations are within a state's authority, *Id.; See also State Board of Equalization v. Young's Market Company*, 299 U.S. 59, 62-63 (1936), although under traditional Commerce Clause limitations it could not ban the sale of other products; *See Baldwin v. G.A.F. Seelig, Inc.* (hereinafter "*Seelig*"), 294 U.S. 511 (1935), likewise it would not necessarily be free to impose similar restrictions with respect to milk. *Healy II*, 669 F. Supp. at 599; *See also Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976).

Since its adoption, the Twenty-First Amendment has remained the governing force in granting states the right to regulate the sale of liquor within their borders. As recently as September, 1984, Judge Friendly of the Second Circuit noted:

> "for some of us who were present at the creation" of the Twenty-First Amendment . . . the Twenty-First Amendment was designed to end the "noble experiment" by which the federal government endeavored to control the drinking habits of all citizens and place

> control of alcoholic beverages in the states. Fulfillment of the latter purpose required that, in addition to repealing the Eighteenth Amendment, which was accomplished by Section 1, the Amendment gives the states full authority to deal with the subject of intoxicating liquor free from limitations imposed by the Commerce Clause, which had hampered such regulation before the Eighteenth Amendment was adopted. This was accomplished by Section 2 of the Twenty-First Amendment which provides: "the transportation or importation in any state, territory or possession of the United States for delivery of use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Jack R. Battipaglia and Bacchus Selections, Inc. v. New York State Liquor Authority, No. 84-7168 (2d Cir. 1984).

In summary, as the District Court correctly concluded, in relation to the Twenty-First Amendment and the Commerce Clause "each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case." *Healy II*, 669 F. Supp. at 550, quoting *Brown-Forman Distillers Corp. v. New York State Liquor Authority* (hereinafter "*Brown-Forman*"), 476 U.S. 573, 106 S. Ct. 2080, 2084 (1986), quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964); *See also Midcal* at 109 (what is required in this area is a pragmatic effort to harmonize state and federal powers).

Appellees maintain that the Twenty-First Amendment does not authorize the states to interfere with commerce in other states. As the District Court correctly found, and as discussed herein, Connecticut's affirmation statute does not in any way interfere with commerce in other states. Appellees' claims to the contrary are spurious. Thus notwithstanding Appellees' wishes to the contrary, the Twenty-First Amendment has a direct bearing in affirming the constitutionality of Connecticut's beer affirmation statute. The Twenty-First Amendment cannot be argued away.

II. CONNECTICUT'S AMENDED BEER AFFIRMATION STATUTE IS CONSTITUTIONAL UNDER THE COMMERCE CLAUSE.

A. Presumption Of Validity Relative To Connecticut's Amended Beer Affirmation Statute.

In contemplating whether a statute, such as Connecticut's beer affirmation statute, is constitutional, legislation is presumed constitutional unless clearly shown not to be so. *Healy II*, 669 F. Supp. at 548-549.

As the District Court correctly concluded, judges should not, in the exercise of the judicial function, undertake to second guess the political judgment of legislatures. Thus, the District Court held that judges *must* [emphasis added] refrain from reading their own policy preferences into the Constitution by striking down legislation deemed to be unwise or even foolish. *Id.*

In a great volume of cases, the courts have enunciated the fundamental rule that there is a presumption in favor of the constitutionality of a legislative enactment. *Hodel v. Indiana*, 101 S.Ct. 2376 (1980). Moreover, every reasonable presumption must be indulged in favor of the validity of an Act. *Home Tel. & Tel. Co. v. Los Angeles*, 211 U.S. 265 (1980).

A fundamental consequence of a presumption in favor of the validity of legislative acts and the duty of the court to resolve all doubts in favor of their validity is that the party alleging the unconstitutionality of a statute has the burden of proof. *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946). Appellees have failed to carry their burden of proof and overcome the presumption of validity relative to Connecticut's amended statute.

B. Connecticut's Beer Affirmation Is Facially Valid.

In *Brown-Forman*, Justice Marshall suggested that the Court "has adopted what amounts to a two-tiered approach

to analyzing state economic legislation under the Commerce Clause," 106 S.Ct. at 2084. Under the two-tier criteria established under *Pike v. Bruce Church, Inc.,* (hereinafter "Pike"), 397 U.S. 137, 142 (1970), the 'per se' invalid tier involved a state statute that directly regulated or discriminated against interstate commerce or in effect favored in-state economic interests over out-of-state economic interests. This kind of statute would be struck down 'per se' without further inquiry. *Id.*

The District Court applied the 'per se' standard enunciated in *Brown-Forman* to Connecticut's affirmation statute and correctly found that the statute did not directly regulate or discriminate against interstate commerce. *Healy II,* 669 F. Supp. at 553. Under the current Connecticut law, shippers must post their price schedule, hold it for the next full month, and affirm that the price, *at the time of posting* [emphasis added], is no higher than the lowest price offered to wholesalers in other states bordering Connecticut. Conn. Gen. Stat. Section 30-63b(b). Since posting occurs at a precise moment in time, it is clear that the Connecticut law is not keyed to any prospective or retroactive time span and thus does not in any way inhibit price changes by out-of-state shippers at any time. Moreover, Conn. Gen. Stat. Section 36-63b(e) specifically provides:

> This section (affirmation) shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any such time during the calendar month covered by such posting.

Clearly a price change by a shipper in another state cannot constitute a violation of Connecticut law. This eliminates the Appellees' argument that Connecticut law facially manifests an impermissible extraterritorial effect as further discussed in Section III. B, herein. Indeed, at one time, Appellees in the pending case withdrew their argument on this point. *Healy II,* ____F.2d____, App. A at p. 6A.

Moreover, there is no possibility that Connecticut's affirmation law regulates prices in other states. This is in contrast to the court's finding that the New York ABC law, struck down in *Brown-Forman*, had an overall effect to directly regulate prices in other states.

For instance, if the lowest price for a case of X brand beer in New York, Rhode Island, and Massachusetts is $10.00 at 10:00 a.m. on January 6 (time of posting in Connecticut; See 7 REG. CONN. AGENCIES, LIQ. CONT. SEC. 30-6-B4a, a copy of which is attached hereto as Appendix F at p. 53A), then the price for that same item in Connecticut must be affirmed at $10.00 or less under Connecticut law. If at any time subsequent to that posting, the price of a case of X brand beer is changed to $9.00 in one of the border states, Connecticut law is not violated, nor does it prevent such a price change.

Appellees maintain that Connecticut law prevents brewers from changing their prices in Massachusetts, New York and Rhode Island. It is not Connecticut law that prevents a price change, although there may be restrictive laws within other states which prevent such changes.

As the District Court correctly concluded "under *Seagram*, Connecticut's affirmation statute is facially valid" because, unlike the version in *Healy I* and *Brown-Forman*, it leaves brewers free to raise or lower prices in the border states before and after posting in Connecticut and does not, therefore, regulate interstate commerce. *Healy II*, 669 F. Supp. at 553.

Connecticut's beer affirmation law also does not discriminate in favoring in-state economic interests over out-of-state interests. Connecticut's Posting and Affirmation statutes are designed in such a way that the wholesaler, retailer and consumer pay prices that are fair and competitive with their counterparts in border states. Furthermore, Connecticut's law does not protect in-state industry at the expense of out-of-state industry, because Connecticut has no in-state brewers. Cf. *Seelig*.

Connecticut's legislation treats all brewers equally, so that no particular brewer, and no one particular state, is disproportionately affected by these statutes. Connecticut simply places upon all brewers desiring to sell their products in Connecticut a uniform element of market price competition. The state's beer affirmation statute is therefore facially valid.

C. Under *Seagram*, Connecticut's Beer Affirmation Statute Is Constitutional.

In *Seagram*, 284 U.S. 35 (1966), the Supreme Court upheld the constitutionality of a New York posting and affirmation statute far more restrictive than the statute at issue. The New York statute in that case required that the monthly price schedules for sales to wholesalers and retailers, as filed with the New York State Liquor Authority, be accompanied by an affirmation that "the bottle and case price of liquor . . . is no higher than the lowest price" at which sales were made anywhere in the United States during the preceding month. *Seagram* at 39-40.

In upholding the constitutionality of the New York law, the Court noted that the case concerned liquor "destined for use, distribution, or consumption in the state of New York," *Id.* at 42. The Court held that "the Twenty-First Amendment demands wide *latitude* [emphasis added] for regulation by the state." *Id.*

The Court reasoned that New York could "constitutionally insist" that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country. *Id.* at 43. Holding for the state, the Court added that the Appellant's argument that the statutes would have a discriminatory effect on their businesses outside the state were largely "conjecture" and that "the mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within the domain which the Constitution forbids." *Id.* at 43.

Seagram has never been overruled and is both stare decisis and the dispositive statement on state liquor affirmation provisions. If it has been somewhat modified by the Supreme Court in *Brown-Forman*, said modifications have no effect on the constitutionality of the Connecticut affirmation statute under the strict limitations set forth therein.

D. Under A Balancing Approach, Connecticut's Beer Affirmation Statute Is Constitutional In That It Places Only Incidental And Indirect Burdens On Interstate Commerce.

The District Court also correctly found that, in addition to being facially valid, Connecticut's beer affirmation statute passed muster under the second prong of the *Pike* two-tier standard enunciated in *Brown-Forman*, namely "the critical consideration—under either test, is the overall effect of the statute on both local and interstate activity". *Brown-Forman*, 106 S.Ct. at 2084.

The District Court correctly discounted the Appellees' assertions that some business of Connecticut residents previously going to border state retailers would shift to Connecticut retailers and found that "some artificially" high prices (in the border states) and/or "artificially" low prices that result in Connecticut from beer price affirmation would not render the statute unconstitutional. In fact, quite to the contrary, the District Court noted that the Supreme Court has held that a state may "constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country." *Seagram*, 384 U.S. at 43; *Healy II*, 669 F. Supp. at 553.

The District Court found that a "non-discriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from predominantly out-of-state industry to a predominantly in-state industry," *Healy II*, 669 F. Supp. at 553, quoting

Minnesota v. Cloverleaf Creamery Company, 449 U.S. 456 (1981). In effect, the District Court found that the disincentive to Connecticut consumers to buy outside the state (not shown to be of more than minor economic significance) and the necessity that brewers set their prices in the border states knowing that they are simultaneously setting their prices in Connecticut, are not excessive burdens or intrusions on commerce, *Healy II*, 669 F. Supp. at 553. Finally, the District Court held that "because Connecticut's statute operates even-handedly and serves a legitimate purpose in reducing discrimination in pricing to wholesalers in Connecticut as opposed to out-of-state wholesalers, such incidental and indirect burdens on interstate commerce do not outweigh the resulting local benefits." *Id.*

E. Connecticut Maintains A Legitimate State Interest Underscored By Its Licensing Apparatus In Regulating The Distribution Of Alcohol Within Its Borders.

Despite voluminous litigation involving Connecticut's Liquor Control Act, Appellees have never provided reasoning as to why prices should be substantially lower in three border states than in Connecticut, or conversely, why they should be much higher in Connecticut than in the border states. Connecticut maintains a plethora of legitimate state interests to regulate importation, distribution and sale of alcoholic liquor within its boundaries, not the least of which is insuring that Connecticut wholesalers and retailers be treated equally by receiving the same prices as their neighbors across state lines. Because the Connecticut law allows brewers to reflect additional shipping and tax costs in determining the affirmed price, there is no valid reason why brewers should charge more in Connecticut than in its three border states.

Connecticut does not seek to dictate the prices at which the brewers offer their products. Connecticut is simply insisting that its wholesalers be placed on an equal footing with wholesalers in the border states, and that they not be singled out to subsidize lower prices charged by brewers in these

border states. This is similar to the mandate which seventeen states with state-run liquor retail operations have given to national liquor distillers and importers, *See Seagram, supra.*

It is fundamental economics that if brewers charge artificially low prices in some states, they will charge comparably higher prices in other states in order to achieve targeted profit margins. Acknowledging this inevitable market price discrimination, Connecticut has sought only to insure that its consumers will not be subsidizing the lower prices being charged to consumers in bordering states.

Moreover, Connecticut has a legitimate state interest in maximizing sales within its own borders in order to increase its tax revenue. Increasing state revenue is particularly important in Connecticut, where there is no state income tax, and the state must rely on a sales tax, and on such taxes as those imposed on alcohol, to fund the state budget. Furthermore, highway safety must be considered a unique factor with regards to traveling across state lines to purchase intoxicating alcohol. The state has a legitimate interest in trying to curtail buying patterns that could lead to increased danger on the highways.

There are some state activities which have been held invalid under the Commerce Clause. In *Philadelphia v. New Jersey*, 437 U.S. 617 (1977), the State of New Jersey attempted to prevent out-of-state shippers from depositing their garbage in New Jersey landfills, while granting the New Jersey sources of garbage preferential treatment in being admitted to their landfill sites. In order to adjudge a state law infirm under the Commerce Clause, the Court stated that "what is crucial is the attempt by one state to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Id.* at 628.

Connecticut's affirmation law does not isolate Connecticut from its border states, but rather insures that the state is treated in harmony with those states and that Connecticut is

not "isolated" in paying higher prices to subsidize prices charged in the border states. In a similar vein, the Connecticut legislature solely seeks to have its wholesalers, retailers and consumers treated in parity with their counterparts in its neighboring states.

In short, the Commerce Clause does not prohibit a state from enacting reasonable legislation to protect the economic interests of its citizens, even if such legislation incidentally affects interstate commerce:

> Where the statute regulates evenhandedly to effectuate a ligitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Id.* at 624, citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

F. The Connecticut Affirmation Statute Promotes Commerce Clause Principles By Eliminating Arbitrary Price Discrimination.

The Twenty-First Amendment has established a national liquor distribution system whereby each state regulates the distribution of alcoholic liquors within its borders. Accordingly, each manufacturer of intoxicating liquor, or in this case brewer or importer, has to choose to apply for and be approved to receive and maintain a license, or as it is sometimes called, a permit, from the states, in which it wishes to operate.

Within this context, a liquor license cannot be considered a contract between the government and the licensee within the

protection of constitutional guarantees, but rather a privilege which may be revoked at any time. *See Hostetter* at 324. Moreover, where an application has been made to the state for a license to sell alcoholic liquors, the statutory rules, regulations, terms and conditions under which such liquors may be sold become binding obligations between the state and the licensee. Thus, those appellees who choose to do business in Connecticut are bound by Connecticut's beer affirmation statute so long as they apply for, are granted, and accept licenses from the state under the terms and conditions outlined by the state. Licensees must also comply with both federal and state standards to maintain their licenses.

There is, therefore, no constitutional right to engage in the sale of alcoholic liquors, and alcoholic liquors are clearly distinguishable from other consumer products, such as milk.

Moreover, markets and distribution channels involving alcoholic liquors are heavily regulated and to a great extent protected through a state-by-state licensing system. Unlike other industries, an upstart brewer/importer could not simply begin operation by manufacturing and distributing its products in the United States without first applying to and being approved by appropriate state and federal regulatory authorities. Thus, there are market entry barriers resulting from the licensing system which serve to artificially protect industry-wide giants, such as many of the appellees in this action, from competition.

Furthermore, without affirmation, the state-by-state liquor distribution system may institutionalize price discrimination. As the District Court noted, "market areas do not always coincide with state borders." *Healy II*, 669 F. Supp. at 546. Thus, for example, when brewers and importers fix prices in New York state, wholesalers throughout the entire state benefit from [illegible]ew York City's market concentration. A Connecticut whole[illegible]er in Stamford, Connecticut, approximately 50 miles from Ne[illegible] City and arguably serving the same market as New Yor[illegible]nder the scheme advocated by Appellees

would not have the benefit of the indigenous competitive forces at work within this market. Ironically not only might this wholesaler be arbitrarily placed at a competitive disadvantage in regard to a counterpart in Westchester, New York, but higher prices charged to a Stamford wholesaler might in effect subsidize lower prices charged to a wholesaler far removed geographically from this market, for example in Syracuse, New York. A wholesaler in Syracuse, New York, which by market standards would not maintain any legitimate "competitive advantage," consequently benefits by New York state law which ties New York City prices to Syracuse prices.

In short, the existing national liquor distribution system as regulated on a state-by-state basis is not a free market and does not afford unregulated price competition.

Short of restructuring the entire national liquor distribution system through repeal of the Twenty-First Amendment, Appellees are attempting to delineate arbitrary market boundaries along state borders. In practice, liquor markets in states are protected markets by virtue of the operation of state regulatory schemes enacted under the Twenty-First Amendment. Liquor markets within state boundaries are protected by state statutes that establish a uniform statewide price for liquor despite varying market concentrations throughout each state.

For example, the same price for beer is charged to wholesalers in Syracuse and New York City, despite a substantially different market concentration in New York City. The Syracuse market, and other markets in the state of New York, are therefore protected by the single price posting mechanism established by the state of New York. The price posted in New York state consequently has no relation to what a competitive market would dictate were the distribution of alcoholic liquors treated similarly to distribution of other products such as milk. Thus in the guise of competition, Appellees attempt to have the courts mandate arbitrary price discrimination along state borders. The Connecticut affirmation statute eliminates the price discrimination advocated by Appellees by ensuring fair and evenhanded pricing to Connecticut wholesalers and thereby enhancing both the spirit and intent of the Commerce Clause.

III. THE COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT.

A. The Connecticut Affirmation Statute Constitutionally Harmonizes The Twenty-First Amendment And Commerce Clause.

Pursuant to the Twenty-First Amendment, states have absolute control in regulating the sale and distribution of beer within their borders. The Twenty-First Amendment therefore creates fifty distinct artificial markets based along geographical state borders. As a result, there is no free market pricing in the importation, distribution and sale of alcoholic liquor. Given the scheme advocated by Appellees, state boundaries would artificially divide geographical markets. They propose to establish arbitrary price distinctions along artificial boundaries in what would constitute a single U.S. market were there no Twenty-First Amendment. However, there is a Twenty-First Amendment—an amendment which carves an exception to the regular operation of the U.S. market.

As previously discussed, were there a free market in alcoholic liquor, the brewers would presumably charge a lower price to New York City wholesalers given the market concentration in New York City. Syracuse wholesalers would arguably be offered a higher price absent equivalent market concentration. The New York liquor regulations, however, ignore the realities of distinct markets and mandate that the same posted price be offered to wholesalers in these two cities. The state regulatory schemes therefore eliminate free market competition *within* states.

As the brewers are restrained by the New York regulatory scheme from charging true market prices to the respective markets within New York state, a corollary suggests that other parts of bordering states, arguably involved in the New York City market in other products, such as Newark, New Jersey or Bridgeport, Connecticut may have artificially higher prices.

As previously discussed, prices for beer have been traditionally higher in Connecticut than the border states. *Healy II*, 669 F. Supp. at 546. By charging higher prices for beer in Connecticut, the brewers presumably have been able to recoup revenues lost through the elimination of normal price competition within other states such as New York. Connecticut residents, therefore, may be subsidizing lower prices to New York residents in markets like Syracuse. Such an inequitable pricing scheme results from an arbitrary and selective application of the Twenty-First Amendment as demanded by Appellees in this case.

In contrast, the Connecticut affirmation provisions at issue seek to harmonize the Twenty-First Amendment and Commerce Clause. Exercising its Twenty-First Amendment powers, Connecticut has attempted to inject competition and market pricing into the region by guaranteeing evenhanded treatment to its wholesalers. While the Twenty-First Amendment eliminates free market pricing between states, Connecticut's statute establishes equal footing between wholesalers in Connecticut and the border states, eliminating the artificially high prices charged to the Connecticut wholesalers.

The Connecticut statute operates to enhance the Connecticut wholesaler's ability to compete by requiring evenhanded pricing. In practice, the Twenty-First Amendment and state liquor regulatory statutes operate to eliminate competition between beer wholesalers. Given a consumer's ability to purchase alcoholic liquor at retail outlets wherever he or she wishes, a Connecticut wholesaler that is arbitrarily charged higher prices than his counterparts in other states will ultimately be economically disadvantaged. Because there is no effective way to compete with wholesalers in border states, Connecticut wholesalers must then suffer arbitrarily higher prices, putting them *a priori* at a disadvantage without any opportunity to compete. The pricing schemes advocated by the brewers would thereby institutionalize these economic disadvantages by mandating arbitrary price discrimination.

In short, it is the Connecticut statute which seeks to promote Commerce Clause principles by enhancing fair com-

petition and not, as with the scheme proposed by Appellees, violate them. The Court of Appeals erred in finding a Commerce Clause violation in that the Connecticut statute conforms with both the spirit and intent of the Commerce Clause.

B. The U.S. Court Of Appeals Erred In Attributing Extraterritorial Effects To The Connecticut Affirmation Statute.

The District Court was correct in concluding that the Connecticut statute does not directly regulate or discriminate against interstate commerce. *Healy II*, 669 F. Supp. at 533. Since posting in Connecticut occurs at a moment in time, it is clear that the Connecticut law is not keyed to any prospective or retroactive time span and thus does not in any way influence or inhibit price changes by out-of-state shippers at any time. Clearly a price change by a shipper in another state cannot constitute a violation of the amended Connecticut law. Moreover, there is no possibility that Connecticut's affirmation law regulates prices in other states.

Notwithstanding these distinctions, the Appellees argued, and the Second Circuit Court of Appeals ruled, that an impermissible extraterritorial effect remains apparent on its face because brewers are in fact not free to change prices in other states because of regulatory restrictions in those other states. Citing the monthly price hold laws in Massachusetts, 138 M.G.L.A. Sec. 25B(d), and the 180 day hold on price reductions mandated by New York law, N.Y. Alco Bev. Cont. Law Sec. 55-b(2) (McKinney 1987), the court found that brewers must still look ahead to consider the impact of their pricing decisions on Connecticut when making pricing decisions in Massachusetts and New York. *Healy II*, ____F.2d____ App. A at pp. 10A–12A.

It is well settled that the practical effect is the critical consideration in determining whether an affirmation statute

is 'per se' invalid under the Commerce Clause. In applying the *Pike per se* analysis to an affirmation statute, courts have considered whether the statute escapes the state borders to control liquor prices in other states. *Brown-Forman*, 476 U.S. at *583* citing *Southern Pacific Co. v. Arizona*, 335 U.S. 761, 775 (1945). However, in this case, Connecticut has done all that it can to remove the extraterritorial effect of its legislation. The Connecticut affirmation provisions do not bar, deter, or delay price decisions in other states. They specifically leave brewers free to select their own price levels in other states. The fact that there are regulatory restrictions on price changes in other states is a matter beyond Connecticut's control. Connecticut has done all that it can do to avoid interference with pricing decisions in other states.

Connecticut eliminated extraterritorial effects of the affirmation statute by enacting the amended affirmation provisions which invite the brewers to change prices in other states at any time. Unlike the New York law in *Brown-Forman*, it is not a violation of the Connecticut statute to change prices in any other state at any time. Nor does Connecticut attempt to influence prices or pricing decisions in other states. Connecticut merely guarantees its residents the lowest price among the border states at an exact moment in time. Any extraterritorial effect is thereby eliminated. Apparently in deference to this logic, plaintiffs at one point withdrew argument on this point. *Healy II*, ____F. 2d____. App. A at p. 6A.

This position is consistent with a recent Supreme Court decision concerning an Indiana tender offer statute. In *CTS Corporation v. Dynamics Corp. of America*, 107 S.Ct. 1637 (1987), (hereinafter "*CTS*"), the Court held that as long as the state only regulated Indiana corporations, the Commerce Clause was not violated. 107 S.Ct. at 1649. The Court went on to discuss the Court of Appeals' analysis relating to balancing the state and federal interests. Rather than engage in a balancing approach, the Supreme Court simply suggested that the substantial and legitimate state interest in regulating corporate governance was permissible and emphasized that courts should exercise judicial restraint in evaluating the

wisdom of state laws that may have some impact on interstate commerce.

> The Constitution does not require the states to subscribe to any particular economic theory. We are not inclined to second-guess the empirical judgments of lawmakers concerning the utility of legislation. 107 S. Ct. at 1651.

The *CTS* opinion bears significantly on this case for two reasons. First, it indicates that the Court has employed a more limited method for evaluating Commerce Clause challenges. By focusing on protectionism, the Court has eliminated *ad hoc* balancing analyses that must inevitably weigh the incidental burdens of state legislation on interstate commerce.

Second, given the focus on *CTS* on protectionism, and away from the extraterritorial effects that frequently accompany state legislation, the opinion suggests that Courts should defer more frequently to a state's legitimate and constitutional exercise of power. To the extent that state discriminatory intent is proscribed by the Commerce Clause, federal courts consequently should not engage in evaluating the wisdom of state policies simply because they have some incidental interstate impact.

Despite the foregoing arguments, the Court of Appeals found that an extraterritorial effect persisted because statutory regulations in the border states, interacting with the Connecticut statute, prevent the brewer's free exercise in pricing decisions. *Healy II*, ____F.2d____; App. A at pp. 10A-12A. The court found that the brewers must consider the impact of their pricing decision on Connecticut when making pricing decisions in border states as a result of the Connecticut beer affirmation provisions. *Healy II*, ____F.2d____; App. A at p. 11A.

The Court of Appeals' analysis suggest that it is the entanglement of the border states' statutes with the Connecticut statute which forces the brewers to consider the Connecticut statute when making pricing decisions. Arguably, Connecticut

is victimized by other states exercising their own Twenty-First Amendment rights through institutionalization of "first in time, first in right" lawmaking. The Second Circuit opinion, if upheld, would mean that pre-existing restrictive regulatory schemes in certain states may prevent states like Connecticut from enacting otherwise permissible statutes under the Twenty-First Amendment.

Ironically, Connecticut's statute is restricted by the extra baggage of the regulatory schemes in the border states under the foregoing Commerce Clause analysis. Rather than adhere to this illogical result, examination of Connecticut's statute under Commerce Clause scrutiny should restrict itself to the constitutionality of the Connecticut beer affirmation provisions in their own right. To do otherwise permits other states to turn both the Commerce Clause and the Twenty-First Amendment on their heads, and in effect to legislate within the borders of Connecticut.

In *Brown-Forman*, the Court enunciated the test for determining whether a statute causes an extraterritorial effect as whether a state's legislation controls prices in other states. The Connecticut affirmation statute, while referencing prices in other states, makes no attempt to control, influence or dissuade the brewers from changing prices in other states. Connecticut cannot legislate prices beyond its borders and makes no attempt to do so. Because the brewers may change prices in other states at anytime in compliance with the regulatory schemes of those states, there is no extraterritorial effect associated with the Connecticut statute.

C. The Court Of Appeals Erred In Not Exercising An Appropriate Level Of Judicial Restraint In Applying *Seagram* And Upholding Connecticut's Beer Affirmation Provisions.

The District Court correctly applied the constitutional standard enunciated in *Seagram* in upholding Connecticut's beer affirmation provisions. In upholding the affirmation

statute in *Seagram*, this Court found that "[t]he mere fact that [the affirmation statute] is geared to appellants pricing policies in other states is not sufficient to invalidate the statute." 284 U.S. at 42.

The Law in *Seagram* was more restrictive than the Connecticut law in that it required that the monthly price schedules for sales to wholesalers and retailers, as filed with the New York State Liquor Authority, be accompanied by an affirmation that "the bottle and case price of liquor . . . is not higher than the lowest price" at which sales were made anywhere in the United States during the preceding month. 284 U.S. at 39-40.

Holding for the state, the Court added that the appellant's argument that the statutes would have a discriminatory effect on their businesses outside the state were largely "conjecture" and that "the mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not with the domain which the Constitution forbids." 284 U.S. at 43. It is worth noting that the record below is devoid of any evidence of economic harm to the brewers in the State of Connecticut or the border states; the harm, if any, remains conjecture.

Dating back to 1952, the Supreme Court noted that "we do not sit as a super legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *DayBrite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). Additionally, in *Seagram* the Supreme Court found that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies who are elected to pass laws . . . it is up to the legislature, not the courts to decide on the wisdom and utility of legislation." 284 U.S. at 47; *Ferguson v. Skrupa*, 372 U.S. 726, 728-730 (1963). The Court's inclination to adhere to principles of judicial restraint has significantly increased during the past decade.

As the Supreme Court noted in *Vance v. Bradley*, 440 U.S. 93, 112 (1979), "when the legislature's purpose is legitimate

and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . no less than debates over the wisdom of other socioeconomic legislation . . . are not to be carried out in the federal courts." As recently as 1987, the Supreme Court reaffirmed this position: "the Constitution does not require the states to subscribe to any particular economic theory. We are not inclinded to second guess the empirical judgments of lawmakers concerning the utility of legislation." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 679 (1981); *See also CTS Corp. v. Dynamics Corp. of America*, 107 S.Ct. 1637 (1987).

The District Court's application of *Seagram* and exercise of an appropriate level of judicial restraint in *Healy II* in upholding Connecticut's beer affirmation law are thus consistent with prevailing judicial norms. Despite Supreme Court precedent upholding the Connecticut affirmation law, the United States Court of Appeals erroneously chose to ignore the applicability of the *Seagram* decision to this case:

> In fact, the *Seagram* court recognized that it perhaps had not had the last word, observing that there would be "time enough to assess the alleged extraterritorial effects" of affirmation statutes "when a case arises that clearly presents them," 384 U.S. at 43. This is such a case. Accordingly, we decline to extend the *Seagram* precedent to validate a simultaneous affirmation provision that, by its purposeful interaction with border-state regulatory schemes, operates to control prices beyond Connecticut's borders. *Healy II*, ____F.2d____; App. A at p. 13A.

Appellants agree with the Court of Appeals in that "this is such a case" that merits review by this Court in light of the Court of Appeals' reluctance to apply Supreme Court precedent. Appellants consequently submit that this Court should grant jurisdiction to reverse the decision of the U.S. Court of Appeals for the Second Circuit.

CONCLUSION

The Twenty-First Amendment sanctions Connecticut's Liquor Control Act including its affirmation provisions.

Connecticut's amended beer price affirmation provisions are constitutional under the Commerce Clause. Connecticut's statute is facially valid under the *Pike* "per se" standard and withstands constitutional scrutiny under the *Pike* balancing test. Moreover, the Connecticut affirmation provisions promote Commerce Clause principles by eliminating arbitrary price discrimination.

Finally, the Court of Appeals erred in attributing extraterritorial effect to the Connecticut affirmation statute and in failing to exercise an appropriate level of judicial restraint in applying *Seagram*.

For all the foregoing reasons, we urge this Court to note probable jurisdiction. In the alternative, and if appropriate, we urge the Court to enter an order summarily reversing the decision of the United States Court of Appeals for the Second Circuit and affirming the original judgment of the United States District Court for the District of Connecticut.

Respectfully Submitted,

Wine & Spirits Wholesalers of Connecticut, Inc.

/s/ William A. Wechsler

WILLIAM A. WECHSLER
BAILEY AND WECHSLER
Counsel of Record
(A Member of the Bar of the U.S. Supreme Court)

ALFRED F. WECHSLER
GREGORY J. SOUTHWORTH
BAILEY AND WECHSLER

66 Forest Street
Hartford, CT 06105
TELEPHONE: (203) 525-9191

September 12, 1988

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

JOHN F. HEALY, et al,
Appellants,

v.

THE BEER INSTITUTE, et al,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 721 — August Term, 1987

(Argued March 18, 1988 Decided JUN 13 1988)

Docket No. 87-7880

THE BEER INSTITUTE (formerly named UNITED STATES BREWERS ASSOCIATION, INC.) as an association, and on behalf of its following members selling beer in the State of Connecticut and the bordering States of Massachusetts, New York and Rhode Island:

Anheuser-Busch, Inc., Miller Brewing Company, Latrobe Brewing Company, Pabst Brewing Company, The Stroh Brewery Company.

ANHEUSER-BUSCH, INC.; G. HEILEMAN BREWING COMPANY; THE GENESEE BREWING COMPANY INC., MILLER BREWING COMPANY; ALL BRAND IMPORTERS, INC.; DRIBECK IMPORTERS, INC., GUINESS-HARP CORP.; LABATT IMPORTERS, INC., MARTLETT IMPORTING COMPANY, INC.; MONTEREY BAY COMPANY, INC.; and VAN MUNCHING COMPANY, INC.,

Plaintiffs-Appellants,

—against—

JOHN F. HEALY and DAVID L. SNYDER, as Commissioners of the Department of Liquor Control; and CHARLES KASMER, as Secretary of the Department of Liquor Control,

Defendants-Appellees,

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC., as an association, and on behalf of its following members selling alcoholic liquor in the State of Connecticut:

JOHNNY BARTON, INC.; THE BRESCOME DISTRIBUTORS CORPORATION; CONNECTICUT DISTRIBUTORS, INC.; EDER BROS., INC.; GALLO WINE MERCHANTS INC.; ALLAN S. GOODMAN, INC.; and HARTLEY & PARKER LIMITED, INC.,

Intervenors
Defendants-Appellees.

Before: TIMBERS, PRATT and MINER, *Circuit Judges.*

Appeal from a summary judgment in favor of appellees entered in the United States District Court for the District of Connecticut (Dorsey, J.), holding that the amended beer price affirmation provisions of the Connecticut Liquor Control Act did not violate the commerce clause.

Reversed.

JEFFREY GLEKEL, New York, NY (Timothy G. Reynolds, Skadden, Arps, Slate, Meagher & Flom, New York, NY; William H. Allen, Covington & Burling, Washington, DC; Jerome I. Chapman, Arnold & Porter, Washington, DC; Gary Nateman, The Beer Institute, Washington, DC, of counsel) *for Plaintiffs-Appellants.*

ROBERT F. VACCHELLI, Asst. Conn. Atty. Gen., Newington, CT (Joseph I. Lieberman, Conn. Atty. Gen., Richard M. Sheridan, Asst. Conn. Atty. Gen., of counsel) *for Defendants-Appellees.*

WILLIAM A. WECHSLER, Hartford, CT (Alfred F. Wechsler, Gregory J. Southworth, Bailey & Wechsler, Hartford, CT, of counsel) *for Intervenors Defendants-Appellees.*

MINER, *Circuit Judge:*

Plaintiffs-appellants The Beer Institute (formerly United States Brewers Association), an industry association of beer brewers and importers, *et al.*, commenced an action in the United States District Court for the District of Connecticut (Dorsey, J.) against defendants-appellees John F. Healy and David L. Snyder, as Commissioners of the Connecticut Department of Liquor Control, and Charles Kasmer, as Secretary of the Department. The complaint asserted that the amended beer price affirmation provisions of the Connecticut Liquor Control Act, 1984 Conn. Acts 332, 432, and § 30-63a(b) of that Act violate the commerce clause, U.S. Const. art. I, § 8, cl. 3, and the supremacy clause, *id.* art. VI, cl. 2. Plaintiffs sought declaratory and injunctive relief to prevent enforcement of these provisions.

Upon cross-motions for summary judgment, the district court granted judgment for the defendants, holding that the challenged provisions were constitutional. *See United States Brewers Ass'n v. Healy*, 669 F. Supp. 543 (D. Conn. 1987). Plaintiffs appeal from this judgment. Because we find that the amended beer price affirmation provisions place an unconstitutional burden on interstate commerce, we reverse.

BACKGROUND

In *United States Brewers Ass'n v. Healy*, 692 F.2d 275 (2d Cir. 1982) ("*Healy I*"), *aff'd*, 464 U.S. 909 (1983) (per curiam), we found that the original beer price affirmation provisions of the Connecticut Liquor Control Act placed an unconstitutional burden on interstate commerce. The Act, now as then, requires "posting" of prices, whereby brewers and out-of-state beer importers "file a schedule stating the per-unit price that [they] will charge Connecticut wholesalers for [beer] products in the following month," *id.* at 276 (footnoted omitted); *see* Conn. Gen. Stat. Ann. § 30-63c (West 1975 & Supp. 1988). Posted prices become effective on the first day of the calendar month following the posting. *See* Conn.

Agencies Regs. § 30-6-B12(b). We noted that "[h]istorically the retail price of beer has been generally higher in Connecticut than in its neighboring states, *i.e.*, Massachusetts, New York, and Rhode Island," 692 F.2d at 276.

To encourage Connecticut residents to buy beer in-state rather than in the neighboring states, the legislature added beer price affirmation provisions to the Act. These provisions required that: (1) brewers adhere to the posted prices during the one-month period for which they were posted, Conn. Gen. Stat. Ann. § 30-63(c); (2) brewers file a sworn affirmation that their posted per-unit prices would be no higher than their prices in the border states for the same period, *id.* § 30-63b(b); (3) Connecticut wholesalers be charged per-unit prices by each brewer no higher than the lowest wholesale price the brewer charges in any border state, *id.* § 30-63a(b); (4) adjustments for rebates, discounts, allowances and any other inducements offered to out-of-state wholesalers be considered in calculating the "lowest" price, *id.* § 30-63c(b); and (5) brewers offer to Connecticut wholesalers all the sizes and packages of their brands offered to border state wholesalers, *id.* Because there are no breweries in Connecticut and all beer is shipped into Connecticut from other states, only out-of-state brewers and importers are affected by the Connecticut price affirmation law.

In striking down the price affirmation provisions as facially invalid, this court observed that they told "a brewer that for any given month when it sells beer to a wholesaler in Massachusetts, New York, or Rhode Island, it may not do so at a price lower than that it has previously announced it will charge to Connecticut wholesalers," *Healy I*, 692 F.2d at 282. "Thus," we concluded, "the obvious effect of the Connecticut statute is to control the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a sale outside of Connecticut," *id.*, in violation of the commerce clause.

Thereafter, the Connecticut Legislature amended the affirmation provisions with the stated purpose of remedying the constitutional problem. Section 30-63b(b) was amended to provide that the "lowest" price charged to border-state wholesalers is determined "at the time of posting," 1984 Conn. Acts 332 ("84-332").[1] At the same time, section 30-63b(e)[2] was added, providing that § 30-63b did not prohibit brewers from changing prices in other states "at any time during the calendar month covered by such posting." However, § 30-63a(b),[3] which prevents brewers from charging Connecticut wholesalers more than their lowest border-state price during the posted period, was not amended. Section 30-63c(b), which establishes how price will be determined under the statute, also was amended by 84-332 to refer to "price . . . at the time of posting." Another amendment applicable to § 30-63c(b) contained a conflicting description of price. This amendment permits only differentials in state taxes and actual delivery costs to be excluded from the determination of "the lowest price" charged to any border-state wholesaler "*during such posted period*," 1984 Conn. Acts 432 ("84-432")[4] (emphasis added), despite the "time of posting" amendment made by 84-332.

Appellants commenced this action on July 25, 1984. In their complaint appellants alleged that " 'the interaction of the posting and affirmation provisions' " of 84-332 and § 30-63a(b) " 'not only limits the price at which out-of-state shippers may sell to Connecticut wholesalers, but also sets the lowest price which an out-of-state shipper may charge anywhere in the Border States during the succeeding month,' " 669 F. Supp. at 547 (quoting Complaint at 14). " 'Thus,' " they alleged, " 'as under the original price affirmation scheme, an out-of-state shipper is not free to lower any Border State price below the previously affirmed Connecticut price,' " *id.* This, they claimed, violated not only the commerce clause, but the supremacy clause as well, "by requiring out-of-state shippers to establish and maintain minimum prices for each item of beer in the four-state area and by precluding them from dealing with any of their customers except on the same or more favorable terms as they dealt with other of their customers," *id.*

The state recognized that § 30-63a(b) " 'standing alone' " seemingly would prevent brewers from lowering the out-of-state prices of products they also sold in Connecticut during the entire month after posting. The state argued, however, that 84-332 made it clear that the price affirmed as the lowest price in the border states need only be effective *at the moment of posting:* brewers are free both before and after posting to raise or lower their prices outside Connecticut. (The posted Connecticut price remains in effect for the following calendar month.) The state submitted a Declaration and Ruling of the Connecticut Liquor Control Commission, made pursuant to the Commission's discretionary authority to "issue declaratory rulings as to the applicability of any statutory provision or of any regulation or order of the agency," Conn. Gen. Stat. Ann. § 4-176, providing, *inter alia:*

> "[W]e must interpret [§ 30-63a(b)] in light of the obvious intention of the Connecticut General Assembly. . . . Accordingly, we determine and declare that C.G.S. § 30-63a(b) mandates only that the brewer in a sale to a Connecticut wholesaler not exceed its previously posted price in Connecticut, but that a sale at a price lower in a border state, during the calendar month covered by such posting, does not contravene this section. . . . To the extent . . . that C.G.S. § 30-63a(b) is inconsistent with [Conn. Pub. Act 84-332], it must be considered impliedly repealed since the latest expression of the legislature controls. Thus under the new affirmation scheme an out-of-state shipper is free to lower any border state price below the previously affirmed Connecticut price."

669 F. Supp. at 547 n.9 (quoting Affidavit of the Liquor Commission at 3–4). Thereafter, appellants withdrew their supremacy clause claim. *See id.* at 548.

The district court observed that "[t]he ruling made clear that, whatever the import of § 30-63a(b), out-of-state shippers need only affirm that at the time of posting in Connecticut

(and *only* at the time of posting), their prices to Connecticut wholesalers are no higher than in the border states," *id.* at 547 (footnote omitted). Judge Dorsey found that "[t]he 1984 amendments to Connecticut's beer affirmation statute make the affirmation statute neither retrospective nor prospective but, rather, contemporaneous," *id.* at 551–52.[5] He therefore framed the issue as "whether Connecticut's requirement that prices to its wholesalers be fixed by pricing decisions in other states violates the commerce clause," *id.* at 552.[6]

Judge Dorsey had "little doubt that Connecticut's present affirmation law would be constitutional under *Seagram [v. Hostetter,* 384 U.S. 35 (1966)]," *id.*, which upheld a *retrospective* affirmation requirement that the New York wholesale price was no higher than the lowest price in any other state during the *preceding* month. However, noting that *Seagram* had been questioned by the Court in *Brown-Forman Distillers Corp. v. New York State Liquor Authority,* 476 U.S. 573 (1986), Judge Dorsey held that the affirmation provisions nonetheless were constitutional, both on their face and in their effect, because: (1) "unlike the version in *Healy I* and *Brown-Forman,*" this statute "leaves brewers free to raise or lower prices in the border states before and after posting in Connecticut and does not, therefore, regulate interstate commerce," 669 F. Supp. at 553; (2) "Connecticut is not seeking lower or better prices for its wholesalers relative to out-of-state wholesalers, but simply equal prices," *id.;* and (3) the statute "operates even-handedly" and legitimately reduces price discrimination against Connecticut wholesalers, *id.* Holding the amended price affirmation provisions constitutional, he stated, "comports with the presumption of validity to which all economic regulatory legislation is entitled" and "with the spirit of the twenty-first amendment, which was intended to return broad control of the liquor industry to the states," *id.* at 552.

On appeal, appellants, as they did in *Healy I,* "have launched an all-out attack on the Connecticut beer price affirmation provisions under the [c]ommerce [c]lause," 692 F.2d at

281, contending that the provisions are protectionist in purpose and effect, are subverted by the *Brown-Forman* decision because it has "significantly undermine[d]" the precedential authority of *Seagram*, and operate to regulate beer prices in the border states in violation of the commerce clause and in excess of Connecticut's regulatory powers under the twenty-first amendment. Because we agree that the realities of beer price regulation in the border state area show that Connecticut's statute inevitably exercises control over "the prices set for sales occurring wholly outside its territory," *id.* at 282, we do not reach the issue of economic protectionism. Accordingly, we hold that the amended Connecticut beer price affirmation provisions directly regulate interstate commerce in violation of the Constitution.

DISCUSSION

A. Commerce Clause

The commerce clause generally forbids "[s]tate regulation that is designed to confer economic benefits on [its] businesses and residents . . . at the expense of businesses and residents of other states," *Healy I*, 692 F.2d at 279; *see, e.g., Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 350–53 (1977). However, "the fact that the law may not have been intended as protectionist or discriminatory will not save it" when the "effect of a state's law is to regulate conduct occurring wholly outside the state," *Healy I*, 692 F.2d at 279; *see, e.g., Edgar v. Mite Corp.*, 457 U.S. 624, 642–43 (1982) (opinion of White, J.); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925). Thus, "[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," it generally is invalidated "without further inquiry," *Brown-Forman*, 476 U.S. at 579; *see, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). When a statute only indirectly affects interstate commerce and regulates evenhandedly, the inquiry is "whether the [s]tate's interest [in regulation] is

legitimate and whether the burden on interstate commerce clearly exceeds the local benefits," *Brown-Forman*, 476 U.S. at 579; *see Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The Supreme Court has emphasized that whether the regulation is direct or indirect, "the critical consideration is the overall effect of the statute on both local and interstate activity," *Brown-Forman*, 476 U.S. at 579; *see Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440–41 (1978), and the interaction of the statute with the regulatory schemes of neighboring states constitutes an "overall effect" which appropriately is considered. *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671 (1981) (plurality) (Iowa law prohibiting 65-ft. double-trailer trucks "now out of step with the laws of all other Midwestern and Western States"); *Raymond Motor Transp.*, 434 U.S. at 445 (Wisconsin double-truck length limitations prevented interline transfers "from carriers that operate only in the 33 States where the doubles are legal"); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 527–28 (1959) (interference with interline transfers by unique Illinois mudguard law); *Southern Pacific Co.*, 325 U.S. at 774–75 (1945) (Arizona train-length law effectively "control[led] train operations beyond the boundaries of the state" by requiring dismantling and reforming of interstate trains at state line); *see also Silver v. Woolf*, 694 F.2d 8, 14 (2nd Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983).

The district court found that the amended Connecticut beer price affirmation provisions do not regulate interstate commerce because they do not prohibit brewers from raising or lowering beer prices in the border states prior to, or following, the Connecticut posting. However, the court did not examine whether in fact the interaction of the Connecticut provisions with the beer price regulations of bordering states would allow such pricing flexibility. Since Connecticut has chosen to regulate beer prices *in reference to* the regulated prices in the border states, it is particularly appropriate to examine the effect of the Connecticut beer price affirmation provisions resulting from their interaction with the regulatory

schemes of the border states. *See Brown-Forman*, 476 U.S. at 580, 583–84.

The Massachusetts beer pricing scheme requires brewers to post prices by the first day of the month to become effective on the first day of the following calendar month. These posted prices cannot be changed by the brewer. *See* Mass. Ann. Laws ch. 138, § 25B(d) (Law. Co-op. 1981). As interpreted by the Liquor Control Commission, the Connecticut law requires brewers to affirm that the beer prices they post, at 10:00 a.m. on the sixth day of each month, *see* Conn. Agencies Regs. § 30-6-B4a, are no higher than the prices that the brewer is then charging in the border states.

Thus, for example, a brewer who posts his February prices for Massachusetts on January 1 must look ahead to the posting and affirmation of his March prices on February 6 in Connecticut. The February prices that he posts in Massachusetts on January 1 will be effective and unchangeable at the time he must post and affirm his Connecticut prices for March on February 6. Therefore, the brewer cannot post a price in Massachusetts that is lower than the price he plans to post over a month later in Connecticut. In this way, a brewer posting his next-month's beer prices in Massachusetts does so under the restriction of Connecticut's affirmation law, which requires that the Connecticut price not be "higher than the lowest price at which such item is then being sold or offered for sale or shipped . . . to any wholesaler" in a border state, Conn. Gen. Stat. Ann. § 30-63a(b). Moreover, the price that the brewer posts in Massachusetts, as he looks ahead to the Connecticut affirmation day, will be effective not merely on that day, but for that *entire* month in Massachusetts. A brewer can therefore undertake competitive pricing based on the market realities of either Massachusetts or Connecticut, but not both, because the Connecticut statute ties pricing to the regulatory schemes of the border states.

In New York, a price that is decreased "per case, draft package or special package of beer sold to beer wholesalers"

cannot be raised for at least 180 days. *See* N.Y. Alco. Bev. Cont. Law § 55-b(2) (McKinney 1987). A brewer who plans to decrease his New York prices on a particular beer package, like the brewer posting his prices in Massachusetts, is confronted with the Connecticut posting and affirmation requirements. Once a price decrease becomes effective in New York, that price will control the price he may offer in Connecticut. On the sixth day of each month in which the New York price reduction is effective, the Connecticut statute will not allow the brewer to charge a higher price in Connecticut for the following month, no matter what the market realities would otherwise dictate. Thus, a brewer could not raise his Connecticut price above the New York level for a total of six calendar months, because the Connecticut statute, in effect, makes the New York pricing decision a decision for Connecticut as well. In addition, the Connecticut affirmation day falling in the last month of the New York price decrease would give Connecticut the benefit of the decreased price for a calendar month beyond the date that it terminates in New York. Clearly this restricts a brewer's ability to promote a beer in New York that also is sold in Connecticut. Moreover, a brewer who sells in both markets would be severely hampered in his ability to respond to market forces, particularly to the competitive demands of the New York City market, the most competitive and lowest priced market in the four-state region, *see* 669 F. Supp. at 546.

Both the Massachusetts and New York statutes provide for administrative exemptions from the beer pricing laws. *See* Mass. Ann. Laws ch. 138, § 25B(d) (exemption only by "written permission of the [Alcoholic Beverages] [C]ommission . . . granted for good cause shown and for reasons not inconsistent with the purpose of this chapter"); N.Y. Alco. Bev. Cont. Law § 55-b(3)(c) ("for good cause shown to its satisfaction" Liquor Authority "may grant waivers to licensees adversely affected by this section"). However, the possibility that an administrative agency may in its discretion grant a deviation from regulatory requirements cannot save the Connecticut statute or shift the responsibility for its effects upon the

regulatory bodies of other states. As the Court observed in *Brown-Forman*, "[w]e would not solve the constitutional problems inherent" in Connecticut's amended affirmation provisions "by indulging the . . . assumption that the [Liquor] Authority will be sensitive to [c]ommerce [c]ause concerns. . . . The protection afforded by the [c]ommerce [c]lause cannot be made to depend on the good grace of a state agency," 476 U.S. at 582 n.5.

Connecticut's affirmation provisions also regulate beer prices in another way: restricting a brewer's ability to offer volume discounts in the border states. While volume discounting is unlawful in Connecticut, *see* Conn. Gen. Stat. Ann. § 30-63(b), it is not generally prohibited in the border states. Brewers complying with the Connecticut affirmation statute must affirm that their prices for the entire state are no higher than any volume-discounted prices offered in competitive border-state markets. The effect of the Connecticut statute is to restrict a brewer's ability to offer volume discounts in competitive markets of the border states since the brewer could then not charge a higher price in the less competitive Connecticut market. In this way, as well, the Connecticut statute regulates pricing in other states.

Connecticut urges us to uphold the statute under *Seagram*. However, Connecticut can find no solace in *Seagram*. We observed in *Healy I* that "the holding in *Seagram* might well validate beer price regulation less intrusive than the" former Connecticut affirmation provisions, "such as a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set it in the surrounding states," 692 F.2d at 283–84. We did not thereby endorse regulation which had the effect of controlling wholesaler beer prices in other states. In fact, we indicated that the validity of such an amended scheme turned on its "leaving those out-of-state prices unregulated by Connecticut," *id.* at 284.

Moreover, the Court has cast doubt upon the continuing validity of the principles underlying *Seagram*. The *Brown-Forman* majority did "not necessarily attach constitutional

significance to the difference between a prospective statute," such as the one it struck down, "and the retrospective statute at issue in *Seagram*." 476 U.S. at 584 n.6. The Court recognized that "one could argue that the effects of the statute in *Seagram* do not differ markedly from the effects of the statute at issue in the present case" but declined to "consider the continuing validity of *Seagram*" since no retrospective statute was before the Court. *Id.* Writing separately, Justice Blackmun would have overruled *Seagram* as "a relic of the past" decided "when affirmation statutes were comparatively new and long before the proliferation of overlapping and potentially conflicting affirmation statutes," *id.* at 586 (Blackmun, J., concurring). He saw "no principled distinction" between the two types of statutes because both, "despite one's best efforts at fine-tuning, operat[e] to affect out-of-state transactions and violat[e] the [c]ommerce [c]lause," *id.*; Note, *Liquor Price Affirmation Statutes and the Dormant Commerce Clause*, 86 Mich. L. Rev. 186, 188 (1987) (concluding "that *all* liquor price affirmation statutes violate the commerce clause").

We, of course, are not empowered to overrule Supreme Court precedent. However, we clearly perceive that the basis of the *Seagram* decision has been eroded and that the Court has indicated strongly that *Seagram* may not survive the decision in *Brown-Forman*. In fact, the *Seagram* court recognized that it perhaps had not had the last word, observing that there would be "time enough to assess the alleged extraterritorial effects" of affirmation statutes "when a case arises that clearly presents them," 384 U.S. at 43. This is such a case. Accordingly, we decline to *extend* the *Seagram* precedent to validate a simultaneous affirmation provision that, by its purposeful interaction with border-state regulatory schemes, operates to control prices beyond Connecticut's borders.

B. **Twenty-First Amendment**

Connecticut maintains that the beer price affirmation provisions represent a valid exercise of its power under the twenty-first amendment "to regulate, or prohibit entirely, the

transportation or importation of intoxicating liquor within [its] borders," *324 Liquor Corp. v. Duffy*, 107 S. Ct. 720, 726 (1987). However, "[i]t is well settled that the [t]wenty-first [a]mendment did not entirely remove state regulation of alcohol from the reach of the [c]ommerce [c]lause." *Brown-Forman*, 476 U.S. at 584. The amendment reserves to states power to regulate " '*transportation* or *importation*' " of liquor " '*into* any [s]tate . . . for delivery or use *therein*,' " *Healy I*, 692 F.2d at 281 (emphasis added), but in no way "modifies the traditional [c]ommerce [c]lause principles that bar a state from regulating the transport, sale, or use of products outside of its own territory," *id.* Thus, our conclusion that the Connecticut statute acts as a direct regulation of beer pricing in other states sufficiently disposes of this issue. *See Brown-Forman*, 476 U.S. at 585. Moreover, the extraterritorial effect of Connecticut's affirmation provisions, particularly as to volume discounting, "may interfere with the ability of other [s]tates to exercise their own authority under the [t]wenty-first [a]mendment" by impinging upon their "regulatory goals" or by "depriv[ing] their citizens of the opportunity to purchase brands of liquor that are sold" in Connecticut, *id.*

CONCLUSION

In light of the foregoing, we hold that the amended Connecticut beer price affirmation provisions directly regulate interstate commerce in violation of the commerce clause. Accordingly, we reverse the judgment of the district court and remand for entry of judgment in favor of plaintiffs.

FOOTNOTES

[1] As amended by 1984 Conn. Acts 332, § 30-63b(b) provides:

> At the time of posting of the bottle, can, keg or barrel and case price required by section 30-63, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-

(continued)

of-state shipper of each brand of beer posted certifying that, at the time of posting, the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees is no higher than the lowest price at which each such item of beer is sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

[2] As added by 1984 Conn. Acts 332, § 30-63b(e) provides:

> This section shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any time during the calendar month covered by such posting.

[3] Section 30-63a(b) provides:

> No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer as defined in section 30-1, at a bottle, can or case price, or price per keg, barrel or fractional unit thereof, higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

[4] 1984 Conn. Acts 432 provides in pertinent part:

> In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered during such posted period by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, [only differentials in price attributable to differences in state taxes and to delivery costs are permissible].

[5] A "retroactive" affirmation statute "require[s] prices to an in-state wholesaler to be at the lowest price at which the product was sold elsewhere during an earlier time period." *Brown-Forman Corp. v. New Mexico Dep't of Alco. Bev. Cont.*, 672 F. Supp. 1383, 1385 (D. N.M. 1987). "Prospective" affirmation "uses as its reference point the price for out-of-state sales

(continued)

of liquor in the future." *Id.* A "simultaneous" (also known as "contemporaneous" or "concurrent") affirmation requires that "at *the moment*" of posting or sale the price to the in-state wholesaler "matches the lowest price at which the product is being sold elsewhere." *See id.; see also* Note, *Liquor Price Affirmation Statutes and the Dormant Commerce Clause*, 86 Mich. L. Rev. 186, 190 n.31 (1987) ("Simultaneous statutes . . . represent a subdivision of the prospective category," retaining its "future-price orientation" but allowing "freedom to change [out of state] prices after the schedule's effective month has begun.").

[6] Several courts have found that simultaneous price affirmation statutes directly regulate out-of-state liquor prices in violation of the commerce clause. *See Brown-Forman Corp. v. New Mexico Dep't of Alco. Bev. Cont.*, 672 F. Supp. 1383 (D. N.M. 1987); *Brown-Forman Corp. v. Tennessee Alco. Bev. Comm'n*, No. 3-86-0926, slip op. (M.D. Tenn. June 30, 1987); *Brown-Forman Corp. v. South Carolina Alco. Bev. Comm'n*, 643 F. Supp. 943 (D. S.C. 1986). The affirmation required by these statutes, however, was not simultaneous with posting, but rather with each sale: Brewers were required to affirm that "*at the moment of sale*" the price to the in-state wholesaler "matches the lowest price at which the product is being sold elsewhere," *Brown-Forman*, 672 F. Supp. at 1385. *See Brown-Forman*, slip op. at 2; *Brown-Forman*, 643 F. Supp. at 947.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES BREWERS ASSOCIATION, et al.	:	
—vs—	:	Civil No. H-84-816 (PCD)
JOHN T. HEALY, et al.	:	

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs are the United States Brewers Association ("USBA") — an industry association of thirty-nine domestic brewers and twenty-three importers of beer — and those of its member companies who sell beer in Connecticut and in the bordering states of Massachusetts, New York and Rhode Island.

Defendants are the Commissioners and Secretary of the Connecticut Department of Liquor Control.

Intervening defendant Wine & Spirits Wholesalers of Connecticut is a trade association of seven companies which sell alcoholic beverages, including beer, at wholesale within Connecticut.

Plaintiffs' complaint seeks a declaratory judgment that the beer price affirmation provisions of Conn. Pub. Act

84-332,[1] 84-432[2] and § 30-63a(b) of the Connecticut Liquor

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[1] Conn. Pub. Act 84-332 provides, in relevant part:

> Each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department on a monthly basis, the bottle, can and case price, and for beer, the price per keg or barrel or fractional unit thereof, of any brand of goods offered for sale in Connecticut, which price when so posted shall be the controlling price for such manufacturer, wholesaler and out-of-state shipper permittee for the month following such posting.
>
> . . . .
>
> . . . .
>
> At the time of posting of the bottle, can, keg or barrel and case price . . ., every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that at the time of posting the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees is no higher than the lowest price at which each such item of beer is sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state. . . .
>
> . . . .
>
> This section shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state . . . at any time during the calendar month covered by such posting. . . .
>
> In determining the lowest price for which any item of beer is or was sold . . . at the time of posting, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any such wholesaler; provided that differentials in price which make only due allowance for the actual costs of delivery are permissible. . . . A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes, approved by the department of liquor control, of his brand which he offers to any wholesaler in any state bordering this state. . . .

[2] Conn. Pub. Act 84-432 provides, in part: "In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered during such posted period by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, [only differentials in price attributable to differences in state taxes and to delivery costs are permissible]."

Control Act[3] violate the commerce clause[4] and the supremacy clause[5] of the United States Constitution. Plaintiffs also seek a permanent injunction to restrain defendants from enforcing these statutes.

Currently pending are cross-motions for summary judgment, which have been exhaustively and intelligently briefed and rebriefed by the USBA, the intervening defendants and the State Attorney General's Office. For the reasons that follow, USBA's motion is denied, and the motion of defendants and intervening defendants is granted.

I. Background

A. The Beer Industry[6]

The beer industry in Connecticut is divided into three marketing levels: (1) brewers and importers; (2) wholesalers; and (3) retailers. Each market participant must hold a valid

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[3] Section 30-63a(b), Conn. Gen. Stat., provides, in part, that:

> No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer . . . at a bottle, can or case price, or price per keg, barrel or fractional unit thereof, higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

[4] "Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." U.S. Const. art. I, § 8, cl. 4.

[5] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

[6] This description is based on submissions of the parties as well as the findings of Blumenfeld, J., in *United States Brewers Ass'n v. Healy*, 532 F. Supp. 1312 (D. Conn.), *rev'd*, 692 F.2d 275 (1982), *aff'd*, 464 U.S. 909 (1983).

Connecticut license to sell, in Connecticut, alcoholic beverages to the tier below and, ultimately, to consumers.

The brewers and importers market national brands such as Budweiser or Miller High Life, and regional or local brands such as Genesee Cream Ale or Piels. There are no breweries in Connecticut. All beer — national or regional — is shipped into Connecticut by brewers and importers designated as "out-of-state shippers" under Connecticut law.

Plaintiffs contend that prices charged and package configurations offered to wholesalers in Connecticut and the bordering states vary in the several markets within the four state area. (Market areas do not always coincide with state borders.) In certain markets, regional brewers or importers price their beers to allow sales to consumers at the lowest prices possible in those markets. Other brewers or importers competing in these areas must consider this competitive pricing in pricing their own product. It is agreed by all parties that the New York City market is the most competitive and prices there are the lowest in the four-state region. Other factors which have an impact on pricing and marketing decisions, such as consumer tastes, packaging, costs and freight, vary from area to area even within these states. Thus, according to plaintiffs, a variable pricing and marketing structure has emerged in Connecticut and the bordering states which results in substantial interstate competition in retail beer sales.

In Connecticut, typically more than one wholesaler sells an out-of-state shipper's products. Each wholesaler generally handles products of more than one out-of-state shipper but is restricted by law from selling to retailers outside its assigned geographical territory.

The primary retail outlets for off-premise consumption of beer in Connecticut are package and grocery stores. Retailers, particularly near the borders, face substantial competition from retail beer outlets in the bordering states. Although prices charged to Connecticut wholesalers are

neither the highest nor the lowest in the four-state region, retail prices historically have been higher in Connecticut. Accordingly, many Connecticut residents have purchased beer at lower retail prices in New York, Massachusetts or Rhode Island.

B. **Price Affirmation**

In 1981, Connecticut amended its Liquor Control Act by adding beer price affirmation provisions. The Act required out-of-state shippers to post, each month, the bottle, can and case price for the brands of beer each sells in Connecticut. The amendment required shippers to execute written affirmations under oath certifying that the posted prices "will be no higher than the lowest price at which each such item of beer is *or will be* sold . . . to any wholesaler in any state bordering this state, at any time during the calendar month covered by such posting." Liquor Control Act § 30-63b(b), as originally amended by Section 12 of Conn. Pub. Act 81-294 (emphasis added). No brewer or importer could sell beer to a wholesaler in Connecticut at a price higher than the lowest price then charged any wholesaler in any state bordering Connecticut. Liquor Control Act § 30-633a(b), as originally amended by Section 11 of Conn. Pub. Act 81-294. Once posted, the affirmed price became the controlling or fixed price for the ensuing month for the out-of-state shipper's products in Connecticut. Rebates, discounts, special promotions and other inducements which lowered the price of beer in the border states required the price to be lowered in Connecticut, but differentials in price were permitted for different state taxes and delivery costs. No allowance was made for different package configurations (e.g., a case of six-packs versus a case of loose cans or bottles), yet for any brand a brewer offered for sale in Connecticut, it had to offer Connecticut wholesalers all the units of that brand offered to wholesalers in the border states.

Thus brewers and importers in the four-state area had the following alternatives: (1) lower their Connecticut prices to

equal the lowest price in any bordering state; (2) raise prices in border states to the Connecticut levels; (3) withdraw from Connecticut the brands of beer sold at lower prices in the border states; or (4) withdraw from the border states the brands of beer sold at lower prices than the Connecticut price.

The 1981 amendments were upheld by the district court, *United States Brewers Ass'n v. Healy* 532 F. Supp. 1312 (D.Conn. 1982), but declared unconstitutional by the Second Circuit, *United States Brewers Ass'n v. Healy*, 692 F.2d 275 (2d Cir. 1982), (hereinafter *"Healy I"*), *aff'd without opinion*, 464 U.S. 909 (1983). The Court of Appeals held that the price affirmation provisions impermissibly burdened interstate commerce and that the twenty-first amendment[7] did not authorize Connecticut to set minimum prices of beer in any other state.

Thereafter, Connecticut enacted the different version of beer price affirmation set out in notes 1–2, *supra*. Instead of requiring out-of-state brewers and importers to certify that their prices "will be" no lower in any of the border states during the month following the posting of prices in Connecticut, the new statute requires only that at the moment of affirmation the prices charged to Connecticut wholesalers *are* no higher than the lowest price then being charged in any border state.

C. The Present Controversy

In their complaint, plaintiffs originally alleged that:

> the interaction of the posting and affirmation provisions of Pub. Act 84-332 with Section 30-63a(b) of the Liquor Control Act not only limits the price at which out-of-state shippers may sell to Connecticut

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[7] "The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

> wholesalers, but also sets the lowest price which an out-of-state shipper may charge anywhere in the Border States during the succeeding month. Thus, as under the original price affirmation scheme, an out-of-state shipper is not free to lower any Border State price below the previously affirmed Connecticut price.

Complaint at 14. They argue that the new provisions violate the supremacy clause by requiring out-of-state shippers to establish and maintain minimum prices for each item of beer in the four-state area and by precluding them from dealing with any of their customers except on the same or more favorable terms as they dealt with other of their customers, viz, Connecticut was forcing them to engage in conduct prohibited by federal antitrust laws.

Defendants conceded that, "standing alone," Conn. Gen. Stat. § 30-63a(b), which was not amended following *Healy I*, appeared to prohibit the lowering of out-of-state prices of products sold in Connecticut during the entire month following the posting of Connecticut prices for that product. Defendants' Brief on Motion for Summary Judgment at 8. However, defendants contend that such an interpretation flies in the face of Conn. Pub. Act 84-332 which explicitly recognizes the right of out-of-state shippers to raise or lower their prices outside Connecticut at any time during the month following posting. In further support of their position, defendants filed a declaration and ruling by the Connecticut Liquor Control Commission.[8] The ruling made clear that, whatever the import of § 30-63a(b), out-of-state shippers need only affirm that at the time of posting in Connecticut (and *only* at the time of

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[8] Conn. Gen. Stat. § 4-176 states that the Liquor Control Commission "may, in its discretion, issue declaratory rulings as to the applicability of any statutory provision or of any regulation or order of the agency. . . ."

posting), their prices to Connecticut wholesalers are no higher than in the border states.[9]

After the Commission's ruling,[10] plaintiffs withdrew their claim based on the supremacy clause and conceded that the affirmation laws, as interpreted by the Commission, would not directly control prices in the border states. Plaintiffs' Memorandum in Support of Their Cross-Motion for Partial Summary Judgment at 18. However, plaintiffs persist in their claim that the affirmation provisions on their face and as applied,

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[9] The Commission stated:

> [W]e must interpret [§ 30-63a(b)] in light of the obvious intention of the Connecticut General Assembly. . . . Accordingly, we determine and declare that C.G.S. § 30-63a(b) mandates only that the brewer in a sale to a Connecticut wholesaler not exceed its previously posted price in Connecticut, but that a sale at a price lower in a border state, during the calendar month covered by such posting, does not contravene this section. . . . To the extent . . . that C.G.S. § 30-63a(b) is inconsistent with [Conn. Pub. Act. 84-332], it must be considered impliedly repealed since the latest expression of the legislature controls. Thus under the new affirmation scheme an out-of-state shipper is free to lower any border state price below the previously affirmed Connecticut price.

Affidavit of the Liquor Commission at 3–4.

[10] For the importance of having definitive indications as to how any particular affirmation will be applied, *see Brown-Forman Distillers v. N.Y. Liquor Auth.*, 106 S. Ct. 2080 (1986), wherein the majority laments that "we have no means of predicting how the [New York] Liquor Authority would" react to an application for a price reduction following posting, and chastizes the dissenters for "indulging [in the] assumption that the Authority will be sensitive to Commerce Clause concerns." *Id.* at 2087, 2086 n.5. The dissent, in turn, expressed the view that the Liquor Authority, like any agency "charged with rectifying questionable applications of necessarily general rules," was entitled to a presumption of constitutionality "consistent with the respect due state administrative organs responsible for the operation of a state law whose constitutionality is challenged. . . ." *Id.* at 2089–90. The ambiguity presented in *Brown-Forman* was avoided by the Commission's ruling. It is to be commended.

> are purely protectionist legislation designed to protect in-state wholesalers and retailers at the expense of out-of-state brewers, wholesalers and retailers. The purpose and effect of the new law is precisely the same as the old law — discouraging purchases of beer by Connecticut residents in the Border Strates by requiring the brewers to offer their products to Connecticut wholesalers at prices which are artificially lower than competition would warrant, or conversely, to artificially raise their prices to Border State wholesalers.

Id. at 19.

Plaintiffs' cross-motion for summary judgment is, thus, bottomed on the unconstitutionality of the amended price affirmation law. Conversely, defendants' motion is based on the claim that the legislation is constitutional.

II. Discussion

A. Summary Judgment Standard

To grant a motion for summary judgment, there can be no "genuine issue as to any material fact" and the moving party must be "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Schwabenbaur u. Board of Educ.*, 667 F.2d 305, 313 (2d Cir. 1981). "The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute." *American Int'l Group, Inc. u. London American Int'l Corp.*, 664 F.2d 348, 351 (2d Cir. 1981), quoting *Heyman u. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319–20 (2d Cir. 1975). Moreover, there must be no controversy as to inferences which may be drawn from the facts of record. *Phoenix Sau. & Loan, Inc. u. Aetna Cas. & Sur. Co.*, 381 F.2d 245, 249 (4th Cir. 1967). In determining whether or not there is a genuine factual issue in the case, the court must "resolve all ambiguities and draw all reasonable inferences against the

moving party." *Schwabenbauer*, 667 F.2d at 313; *see also United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). However, one against whom summary judgment is sought cannot rely on factually unsubstantiated conclusory allegations to sustain a claim that questions of fact exist. *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552–53 (1986). That both sides have moved for summary judgment "does not mean that the court must grant judgment as a matter of law for one side or the other," *Schwabenbaur*, 667 F.2d at 314, and it is error to "assume that no material facts remain in dispute simply because both parties moved for summary judgment." *In re Citizens Loan & Sav. Co.*, 621 F.2d 911, 913 (8th Cir. 1980) (citation omitted).

B. The Commerce Clause and the Twenty-First Amendment

Judges must not, in the exercise of the judicial function, undertake to second-guess the political judgment of legislators. Quite to the contrary, judges must refrain from reading their own policy preferences into the Constitution by striking down legislation deemed to be unwise or even foolish. *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905); *see also 324 Liquor Corp. v. Duffy*, 107 S.Ct. 720, 733–34 (1987). Although courts must determine whether a challenged statute is or is not constitutional — a task concededly involving judgment and interpretation — legislation is presumed constitutional unless clearly shown not to be so. *State v. Warren*, 169 Conn. 207, 217 (1975). Moreover, where a statute permits of two constructions, one valid and the other invalid as unconstitutional, the valid construction should be adopted "even where it is not the obvious one." *Lublin v. Brown*, 168 Conn. 212, 219–20 (1975).

A state's authority to regulate aspects of the liquor industry is greater than other areas of regulation by virtue of the twenty-first amendment. Section 2 of that amendment provides: "The transportation or importation into any State,

Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited." Section 2 "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Because a state may entirely exclude alcoholic beverages from its markets, less restrictive forms of regulation are within a state's authority.

> The Twenty-first Amendment thus gives the states broad power to ban, restrict, or otherwise regulate importation and in-state traffic in alcoholic beverages and thereby eliminates some of the otherwise applicable Commerce Clause constraints. For example, a state may prohibit entirely the sale of intoxicating liquors within its borders, *see State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 62–63 (1936) although under traditional Commerce Clause limitations it could not ban the sale of other products, *see, e.g., Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. [514,] 521 [(1935)] (wholesale milk) . . . . Or a state may prohibit local dealers from selling beer manufactured in another state on the ground that the latter state discriminate against beer manufactured in the first state, *see Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U.S. 391 (1939), although it would not be free to impose the same type of restrictions with respect to milk, *see Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976); nor could it constitutionally prohibit the exportation of local ground water to another state on the basis that the latter state would forbid exportation of its water to the first state, *see Sporhase v. Nebraska*, 458 U.S. 941 (1982).

Healy I, 692 F.2d at 280-281 (other citations omitted). [11]

However, as *Healy I* states, not even in the area of regulating intoxicating beverages is the authority of a state absolute.[12] The twenty-first amendment "has not operated totally to repeal the Commerce Clause in the area of the regulation of traffic in liquor." *Joseph E. Seagrem & Sons v. Hostetter*, 384 U.S. 35, 42 (1966). The commerce clause — though worded as a grant of affirmative power to Congress — has traditionally been interpreted to limit state action which affects economic activities outside its own borders. "In general the Commerce Clause is viewed as intending to promote free trade among the states and to liberate the flow of articles in commerce from the provincialism evident in local regulations." *Healy I*, 692 F.2d at 278.[13] State statutes which directly discriminate against interstate commerce or which favor in-state economic interests over out-of-state interests are per se

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[11] The distinction drawn by the Court of Appeals between milk and liquor may not be quite as sharp following the Supreme Court's decision in *Brown-Forman* in which the Court relied heavily on *Seelig* in overturning New York's affirmation statute.

[12] The Supreme Court is currently divided as to how extensively the twenty-first amendment was intended to authorize state regulation of the liquor industry. *Compare* the opinion of the Court, (Powell, J.), in *324 Liquor Corp.*, 107 S. Ct. at 726 (the "States' Twenty-first Amendment powers, though broad, are circumscribed by other provisions of the Constitution"), *with* the dissent, (O'Connor, J.), *id.* at 730 (endorsing former Justice Black's view "that the Senators who approved the Twenty-first Amendment thought they were returning absolute control over the liquor industry to the States"). *See also Newport v. Iacobucci*, 107 S. Ct. 383 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984).

[13] From the late nineteenth century until the New Deal, the commerce clause was used — often in conjunction with the due process clause of the fourteenth amendment — to invalidate numerous state regulatory measures. *See, e.g., Seelig*. From 1945 to 1970 the commerce clause was invoked rarely — and the due process clause hardly at all — to strike down economic legislation. In the last decade, the Supreme Court increasingly entertained objections to state statutes based on the burdens imposed on interstate commerce. *See, e.g., New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982).

unconstitutional. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Bacchus Imports*. Even where a state statute "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental," it will not be sustained if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citations omitted). "[T]here is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman*, 106 S. Ct. at 2084.

Thus, "the Twenty-first Amendment and the Commerce Clause 'each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case.'" *Id.* at 2087, quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964); *see Midcal*, 445 U.S. at 109 (what is required in this area is a "pragmatic effort to harmonize state and federal powers").

C. **The Affirmation Issue**

Against the foregoing general principles, the cases in the field of liquor affirmation must be examined for their application to the legislation adopted by Connecticut.

In *Seagram*, the Supreme Court unanimously upheld a New York requirement that alcoholic beverage brand owners affirm that the price charged to New York wholesalers was "no higher than the lowest price" than was charged anywhere in the country in the *preceding* month.

> The mere fact that § 9 [the price affirmation section] is geared to appellant's pricing policies in other States is not sufficient to invalidate the statute. As part of its regulatory scheme for the sale of liquor, New York

> may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country. The serious discriminatory effects of § 9 alleged by appellants on their business outside New York are largely matters of conjecture. . . . It will be time enough to assess the alleged extraterritorial effects of § 9 when a case arises that clearly presents them. "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids."

Seagram, 384 U.S. at 43, quoting Osborn v. Ozlin, 310 U.S. 53, 62 (1940). Although the Court thus rejected the argument that the New York affirmation law was facially invalid, it made clear that future decisions would depend on the facts of each case. *See id.* at 52 ("it is possible that specific future application of [the statute] may engender concrete applications of constitutional dimension").

Indeed, the next challenge to New York's affirmation law, the challenge was successful. In *Brown-Forman*, the Court declared unconstitutional an amended version which required distillers to affirm that the price charged to New York wholesalers "is no higher than the lowest price at which such item of liquor *will be* sold by such [distiller] to any wholesaler anywhere" in the nation. Alcoholic Beverage Control Law § 101-b(3)(d) (McKinney Supp. 1986) (emphasis added). The Court stressed the fact that, by requiring such an affirmation, New York made it illegal for distillers to reduce prices in other states during the following month in which the posted New York prices were in effect. By so doing, New York had " 'project[ed] its legislation' into other States" in violation of the commerce clause. *Brown-Forman*, 106 S. Ct. at 2087, quoting *Seelig*, 294 U.S. at 52.

> While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other

> States surrender whatever competitive advantages they may possess. Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States. . . . The mere fact that the effects of New York's [affirmation law] are triggered only by sales of liquor within the State of New York . . . does not validate the law if it regulates the out-of-state transactions of distillers who sell in-state.

Id. at 2085.

The Court distinguished *Seagram* on the ground that the earlier version of New York's affirmation law was *retrospective* in nature — requiring only that the affirmed price be no higher than the lowest price at which sales were made during the *previous* month — whereas the amended version was *prospective*. Thus, the earlier version regulated the price charged in New York in relation to prices charged outside the state, whereas the later version limited prices charged outside the state for the month after the price was posted in New York. This was precisely the distinction relied on by the Second Circuit in *Healy I* in striking down Connecticut's original beer price affirmation law (which also had a prospective reach).

> The New York statute [in *Seagram*] differed significantly from the Connecticut statute, because, unlike Connecticut's [original] beer price affirmation provisions which control brewers' *future* conduct in the states surrounding Connecticut, the New York law in *Seagram* merely required that New York prices reflect what had been charged elsewhere in the past. Thus, the New York law, although it affected the prices that manufacturers would choose to set in other states, did not limit the freedom of a manufacturer at any given time to raise or lower prices in any other state.

692 F.2d at 283.

Brown-Forman explicitly embraced *Healy I*:

> We agree with . . . the *Healy* court that a "prospective" statute such as Connecticut's [original] beer affirmation statute, or New York's liquor affirmation statute, regulates out-of-state transactions in violation of the Commerce Clause. Once a distiller has posted prices in New York, it is not free to change its prices elsewhere in the United States during the relevant month. Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce. . . . While New York may regulate the sale of liquor within its borders, and may seek lower prices for its residents [as it did in *Seagram*], it may not "project its legislation into [other States] by regulating the price to be paid" for liquor in those States.

Id. at 2086 (citations omitted).

The 1984 amendments to Connecticut's beer affirmation statute make the affirmation statute neither retrospective nor prospective but, rather, contemporaneous. Brewers must affirm that the price charged at 10:00 a.m. on the sixth day of each month to Connecticut wholesalers is no higher — *at that moment* — than the lowest price then being charged to wholesalers in the border states. The posted price must remain in effect in Connecticut for one month. Nonetheless, brewers and importers are free to raise or lower their prices in the border states. Of course a brewer or importer is still obliged to factor into its business decisions the recognition that its lowest price in any of the border states on the day of posting must be offered to Connecticut wholesalers for the ensuing month. The issue in the instant case, therefore, is whether Connecticut's requirement that prices to its wholesalers be fixed by pricing decisions in other states violates the commerce clause.

There is little doubt that Connecticut's present affirmation law would be constitutional under *Seagram*. The difficulty lies in assessing *Seagram's* precedent vitality. *Brown-Forman* decided only the questions presented in that case and left open the constitutionality of affirmation statutes less oppressive than the prospective legislation there struck down. Although the Court appeared to emphasize that the different result from that in *Seagram* resulted from the difference between retrospective and prospective affirmation laws, the Court qualified its analysis:

> While we hold that New York's prospective price affirmation statute violates the Commerce Clause, we do not necessarily attach constitutional significance to the difference between a prospective statute and the retrospective statute at issue in *Seagram*. Indeed, one could argue that the effects of the statute in *Seagram* do not differ markedly from the effects of the statute at issue in the present case. If there is a conflict between today's decision and the *Seagram* decision, however, there will be time enough to address that conflict should a case arise involving a retrospective statute. Because no such statute is before us now, we need not consider the continuing validity of *Seagram*.

Id. at 2087 n.6. Justice Blackmun, who joined the opinion of the Court (except for footnote 6), filed a concurrence to state that he "would go further and overrule" *Seagram*, which he characterized as "a relic of the past":

> [*Seagram*] was decided when affirmation statutes were comparatively new and long before the proliferation of overlapping and potentially conflicting affirmation statutes that has taken place in the last two decades. I see no principled distinction that can be drawn for constitutional analysis between New York's current prospective statute and the same State's retroactive statute upheld in *Seagram* . . . . Either type, despite one's best efforts at fine tuning, operates

> to affect out-of-state transactions and violates the Commerce Clause. Our failure to overrule *Seagram* now merely preserves uncertainty and will breed or necessitate further litigation. We should face reality and overrule *Seagram*.

Id. at 2088.

Despite the "uncertainty" referred to by Justice Blackmun, Connecticut's beer affirmation statute is here held to be constitutional. Such a finding comports with the presumption of validity to which all economic regulatory legislation is entitled. Such a finding comports, also, with the spirit of the twenty-first amendment, which was intended to return broad control of the liquor industry to the states. And it accords with dicta in *Healy I* to the effect that "[g]iven the latitude allowed a state under the Twenty-first Amendment . . . *Seagram* might well validate beer price regulation less intrusive than the present Connecticut statute, such as a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set in the surrounding states . . . leaving those out-of-state prices unregulated by Connecticut." *Seagram*, 692 F.2d at 283–284.

Above all, such a finding is consistent with the Supreme Court's interpretation of the commerce clause as it has evolved to date. Whatever the future fate of *Seagram*, no other Justice joined Blackmun's call in *Brown-Forman* for its demise; it remains to be considered by lower courts, unless and until it is formally overruled. *Cf. Healy I*, 532 F. Supp. at 1325 n.48 (rejecting USBA's argument that *Seagram* must be relegated to a "different era" of constitutional adjudication). Under *Seagram*, Connecticut's affirmation statute is facially valid because, unlike the version in *Healy I* and *Brown-Forman*, it leaves brewers free to raise or lower prices in the border states before and after posting in Connecticut and does not, therefore, regulate interstate commerce. Although plaintiffs cite

numerous excerpts from the legislative debates over beer price affirmation to show that many voted for the measure intended it to protect local wholesalers and retailers from the competition of wholesalers and retailers in the border states,[14] the price flexibility provided by the latest amendments destroys much, if not all, of the force of their argument. Moreover, Connecticut is not seeking lower or better prices for its wholesalers relative to out-of-state wholesalers, but simply equal prices. "The legislative intent to secure 'fairer' or 'more equal' competition can hardly be characterized as 'protectionist' within the meaning of the Commerce Clause." *Healy I*, 532 F. Supp. at 1323.

In addition to being facially valid, the statute also passes muster under the second of the two-tier standard enunciated in *Pike*. "[T]he critical consideration" — under either test — "is the overall effect of the statute on both local and interstate activity." *Brown-Forman*, 106 S. Ct. at 2084. Crediting USBA's assertions that some business of Connecticut residents previously going to border state retailers will shift to Connecticut retailers, and that some "artificially" high prices (in the border states) and/or some "artificially" low prices (in Connecticut) will result from beer price affirmation even as amended, the "mere fact" that an affirmation law "is geared to . . . pricing policies in other States is not sufficient to invalidate the statute" because a state may "constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country," *Seagram*, 384 U.S. at 43, and because a "non-discriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981). Any state economic regulatory legislation exerts some impact on interstate commerce and courts should be cautious in striking down such legislation merely because "the faintest

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[14]On this point, see the district court opinion in *Healy I*, 532 F. Supp. at 1318 n.16, 1323 n.41.

economic ripples begin to flow outside state borders . . . ." *Brown-Forman*, 106 S. Ct. at 2091 n.8 (Stevens, J., dissenting). The disincentive to Connecticut consumers to buy outside the state, not shown to be of more than minor economic significance, and the necessity that brewers set their prices in the border states knowing that they are simultaneously setting their prices in Connecticut are not an excessive intrusion on commerce. Because Connecticut's statute operates evenhandedly and serves a legitimate purpose in reducing discrimination in pricing to wholesalers in Connecticut as opposed to out-of-state wholesalers, such incidental and indirect burdens on interstate commerce do not outweigh the resulting local benefits.

Finally, it is worth noting that the commerce clause, though often construed as restrictive of a state's authority, does not prohibit anything. It is a positive grant of authority to Congress to regulate matters of national economic importance. Since Connecticut is only one of over thirty states with affirmation laws, the problems posed by "overlapping and potentially conflicting affirmation statutes," *id.* at 2088 (Blackmun, J., concurring)[15] are appropriate subjects for Congress to address — consistent, of course, with the limits imposed on both Congress and courts by the twenty-first amendment. To date, Congress has not done so. Plaintiffs may press their case in the national legislative arena, a better use of the powers created by the Constitution than to have this court strike down state regulatory legislation with a legitimate local purpose that does not impermissibly burden interstate commerce.

Accordingly, defendants' motion for summary judgment is granted.

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[15]Statutes, such as Connecticut's, enacted in several states, though overlapping, are unlikely to conflict, but, as pointed to prices at the lowest common denominator, are more likely to produce harmony, i.e., uniform low prices.

SO ORDERED.

Dated at Hartford, Connecticut, this 11th day of September, 1987.

/s/ Peter C. Dorsey

Peter C. Dorsey
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES BREWERS ASSOCIATION, ET AL.	)	
VS.	)	CIVIL H-84-816 PCD
JOHN T. HEALY, ET AL.	)	

JUDGMENT

This action having come on for consideration of the cross-motions for summary judgment before the Honorable Peter C. Dorsey, United States District Judge, and

The Court having considered the full record of the case including applicable principles of law, and the Court having filed its Ruling on Cross-Motions for Summary Judgment, granting the defendants motion,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the defendants.

Dated at Hartford, Connecticut, this 15th day of September 1987.

KEVIN F. ROWE,
Clerk

By Dennis P. Iavarone
Dennis P. Iavarone
Deputy in Charge

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE BEER INSTITUTE, et al Plaintiffs	:	Docket No. 87-7880
v.	:	
JOHN F. HEALY, et al Defendants	:	July 5, 1988

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The Wine and Spirits Wholesalers of Connecticut, Inc., as an association and on behalf of its following members selling alcoholic liquor in the State of Connecticut: Johnny Barton, Inc.; the Brescome Distributors Corporation; Connecticut Distributors, Inc.; Eder Bros., Inc.; Gallo Wine Merchants, Inc.; Allan S. Goodman, Inc.; and Hartley & Parker Limited, Inc., Intervenor Defendants in the aforementioned action, hereby appeal to the Supreme Court of the United States from the final order reversing the District Court entered in this action on June 13, 1988.

This appeal is taken pursuant to 28 U.S.C. Sec. 1254 (2).

Dated at Hartford, Connecticut, this 5th day of July, 1988.

INTERVENOR-DEFENDANTS
WINE AND SPIRITS WHOLESALERS
OF CONNECTICUT, INC.

William A. Wechsler
Bailey and Wechsler
66 Forest Street
Hartford, CT. 06105
Tel: (203) 525-9191

PROOF OF SERVICE

This is to certify that the undersigned served one copy of the foregoing Notice of Appeal upon each other party separately represented by depositing same this 5th day of July, 1988, at the U.S. Post Office in Hartford, Connecticut, with first-class postage prepaid addressed to the below listed counsel of record:

Jeffrey Glekel, Esq.
Timothy G. Reynolds, Esq.
Skadden, Arps, Slate,
Meagher & Flom
919 Third Avenue
New York, N.Y. 10022

Jerome I. Chapman, Esq.
Arnold & Porter
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036

Robert F. Vacchelli, Esq.
Richard M. Sheridan, Esq.
State of Connecticut
Office of the Attorney General
MacKenzie Hall
110 Sherman Street
Hartford, Connecticut 06105

William H. Allen, Esq.
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044

Gary Nateman, Esq.
Tne Beer Institute
1750 K. Street, N.W.
Washington, D.C. 20006

William A. Wechsler

APPENDIX E

Substitute Senate Bill No. 351

PUBLIC ACT NO. 84-332

AN ACT CONCERNING AFFIRMATION OF THE WHOLESALE PRICE OF SPIRITS, WINE AND BEER.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Subsection (c) of section 30-63 of the general statutes is repealed and the following is substituted in lieu thereof:

(c) Each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department, ON A MONTHLY BASIS, the bottle, can and case price, and for beer, the price per keg or barrel or fractional unit thereof, of any brand of goods offered for sale in Connecticut, which price when so posted shall be the controlling price for such manufacturer, wholesaler or out-of-state permittee for the month following such posting. Notice of all manufacturer, wholesaler and out-of-state shipper permittee prices shall be given to permittee purchasers by direct mail or advertising in a trade publication having circulation among the retail permittees except a wholesaler permittee may give such notice by hand delivery. Price postings with the department setting forth wholesale prices to retailers shall be available for inspection during regular business hours at the offices of the department by manufacturers and wholesalers until three o'clock p.m. of the first business day after the last day for posting prices. A manufacturer or wholesaler may amend his posted price for any month to meet a lower price posted by another manufacturer or wholesaler with respect to alcoholic liquor bearing the same brand or trade name and of like age, vintage, quality and unit container size; provided that any such amended

price posting shall be filed before three o'clock p.m. of the fourth business day after the last day for posting prices; and provided further such amended posting shall not set forth prices lower than those being met. Any manufacturer or wholesaler posting an amended price shall, at the time of posting, identify in writing the specific posting being met.

Sec. 2. Section 30-63a of the general statutes is amended by adding subsection (c) as follows:

(NEW) (c) No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale, to a wholesaler permittee any brand of wine as defined in section 30-1, at a bottle, can or case price higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported, or delivered by such manufacturer or out-of-state shipper to any wholesaler in any other state of the United States or in the District of Columbia or to any state, including an agency of such state, which owns and operates retail liquor outlets.

Sec. 3. Section 30-63b of the general statutes is repealed and the following is substituted in lieu thereof:

(a) At the time of posting of the bottle, can and case price required by section 30-63, AS AMENDED BY SECTION 1 OF THIS ACT, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of such alcohol and spirits posted certifying that AT THE TIME OF POSTING the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees [during the period of the posting will be] IS no higher than the lowest price at which each such item of alcoholic liquor is [or will be] sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any other state of the United States or in the District of Columbia, or

to any state or agency of a state which owns and operates retail liquor outlets. [, at any time during the calendar month covered by such posting.]

(b) At the time of posting of the bottle, can, keg or barrel and case price required by section 30-63, AS AMENDED BY SECTION 1 OF THIS ACT, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that AT THE TIME OF POSTING the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees [during the period of the posting will be] IS no higher than the lowest price at which each such item of beer is [or will be] sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state. [, at any time during the calendar month covered by such posting.]

(c) AT THE TIME OF POSTING OF THE BOTTLE, CAN AND CASE PRICE REQUIRED BY SECTION 30-63, AS AMENDED BY SECTION 1 OF THIS ACT, EVERY HOLDER OF A MANUFACTURER OR OUT-OF-STATE SHIPPER'S PERMIT, OR THE AUTHORIZED REPRESENTATIVE OF A MANUFACTURER, SHALL FILE WITH THE DEPARTMENT OF LIQUOR CONTROL A WRITTEN AFFIRMATION UNDER OATH BY THE MANUFACTURER OR OUT-OF-STATE SHIPPER OF EACH BRAND OF WINE POSTED CERTIFYING THAT AT THE TIME OF POSTING THE BOTTLE, CAN OR CASE PRICE TO THE WHOLESALER PERMITTEES IS NO HIGHER THAN THE LOWEST PRICE AT WHICH EACH SUCH ITEM OF WINE IS SOLD, OFFERED FOR SALE, SHIPPED, TRANSPORTED OR DELIVERED BY SUCH MANUFACTURER OR OUT-OF-STATE SHIPPER TO ANY WHOLESALER IN ANY OTHER STATE OF THE UNITED STATES OR IN THE DISTRICT OF COLUMBIA, OR TO ANY STATE OR AGENCY OF A STATE WHICH OWNS AND OPERATES RETAIL LIQUOR OUTLETS.

[(c)] (d) By and with the consent of the department a manufacturer or out-of-state shipper may file with the department the affirmation required by this section once and may certify thereon that such affirmation shall remain in full force and effect until rescinded by said manufacturer or out-of-state shipper; such rescission to be effective at the beginning of a new posting period required by section 30-63, AS AMENDED BY SECTION 1 OF THIS ACT, and such notice of rescission shall be given at least fifteen days before its effective date. In the event of the rescission of an affirmation such manufacturer or out-of-state shipper shall not ship, transport, deliver, sell or offer to sell to a wholesaler permittee until a new affirmation is filed with said department in accordance with the provisions of this section.

(e) THIS SECTION SHALL NOT PROHIBIT A MANUFACTURER OR OUT-OF-STATE SHIPPER PERMITTEE OR THE AUTHORIZED REPRESENTATIVE OF A MANUFACTURER FROM CHANGING PRICES TO ANY WHOLESALER IN ANY OTHER STATE OF THE UNITED STATES OR IN THE DISTRICT OF COLUMBIA, OR TO ANY STATE OR AGENCY OF A STATE WHICH OWNS AND OPERATES RETAIL LIQUOR OUTLETS AT ANY TIME DURING THE CALENDAR MONTH COVERED BY SUCH POSTING.

Sec. 4. Section 30-63c of the general statutes is repealed and the following is substituted in lieu thereof:

(a) In determining the lowest price for which any item of such alcohol and spirits is or was sold, offered for sale, shipped, transported or delivered [during such posted period] AT THE TIME OF POSTING by any manufacturer or out-of-state shipper to a wholesaler in any other state or in the District of Columbia or to any state or state agency which owns and operates retail liquor outlets, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any

such wholesaler in another state or in the District of Columbia or to any state or state agency which owns and operates retail liquor outlets; provided that differentials in price which make only due allowance for differences in state taxes and fees and for the actual cost of delivery are permissible.

(b) In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered [during such posted period] AT THE TIME OF POSTING by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any such wholesaler; provided that differentials in price which make only due allowance for differences in state taxes and fees and for the actual cost of delivery are permissible. As used in this section, the term "state taxes and fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon a gallon or liter of such alcohol and spirits or each barrel, or fractional unit thereof, of beer and the term "gallon" shall mean one hundred twenty-eight fluid ounces and the term "liter" shall mean one thousand milliliters and the term "barrel" means not less than twenty-eight nor more than thirty-one gallons. A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes, approved by the department of liquor control, of his brand which he offers to any wholesaler in any state bordering this state.

(c) IN DETERMINING THE LOWEST PRICE FOR WHICH ANY ITEM OF WINE IS OR WAS SOLD, OFFERED FOR SALE, SHIPPED, TRANSPORTED OR DELIVERED AT THE TIME OF POSTING, BY ANY MANUFACTURER OR OUT-OF-STATE SHIPPER TO A WHOLESALER IN ANY OTHER STATE OR IN THE DISTRICT OF COLUMBIA OR TO ANY STATE OR STATE AGENCY WHICH OWNS AND OPERATES RETAIL LIQUOR OUTLETS, APPROPRIATE REDUCTIONS

WILL BE MADE FOR ALL DISCOUNTS, REBATES, FREE GOODS, ALLOWANCES AND OTHER INDUCEMENTS OF ANY KIND WHATSOEVER, INCLUDING DEPLETION AND FLOOR-STOCK ALLOWANCES, OFFERED OR GIVEN TO ANY SUCH WHOLESALER IN ANOTHER STATE OR IN THE DISTRICT OF COLUMBIA OR TO ANY STATE OR STATE AGENCY WHICH OWNS AND OPERATES RETAIL LIQUOR OUTLETS, PROVIDED DIFFERENTIALS IN PRICE WHICH MAKE ONLY DUE ALLOWANCE FOR DIFFERENCES IN STATE TAXES AND FEES AND FOR THE ACTUAL COST OF DELIVERY ARE PERMISSIBLE.

Certified as correct by

_____

Legislative Commissioner.

_____

Clerk of the Senate.

_____

Clerk of the House.

Approved _____, 1984

_____

Governor, State of Connecticut.

Substitute Senate Bill No. 429

PUBLIC ACT NO. 84-432

AN ACT CONCERNING PRICES AND APPOINTMENT OF DISTRIBUTORSHIPS FOR BEER WHOLESALERS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Subsection (b) of section 30-63c of the general statutes is repealed and the following is substituted in lieu thereof:

(b) In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered during such posted period by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any such wholesaler; provided that differentials in price which make only due allowance for differences in state taxes and fees and for the actual cost of delivery are permissible. As used in this section, the term "ACTUAL COST OF DELIVERY" SHALL MEAN THOSE EXPENSES INCURRED BY SUCH MANUFACTURER OR OUT-OF-STATE SHIPPER IN DELIVERING THE ITEM OF BEER TO THE WHOLESALER FROM THE POINT OF ORIGIN TO THE POINT OF DESTINATION, THE TERM "POINT OF ORIGIN" SHALL MEAN THE LOCATION WHICH HAS BEEN ESTABLISHED THROUGH COURSE OF DEALING AS THE GEOGRAPHIC LOCATION FROM WHICH THE WHOLESALER HAS BEEN CHARGED BY THE MANUFACTURER OR OUT-OF-STATE SHIPPER FOR COSTS OF TRANSPORTATION, NOTWITHSTANDING THE FACT THAT THE ITEM OF BEER MAY HAVE BEEN MANUFACTURED OR BOTTLED AT, OR SHIPPED FROM, A

DIFFERENT GEOGRAPHIC LOCATION, THE TERM "POINT OF DESTINATION" SHALL MEAN THE LOCATION WHICH HAS BEEN ESTABLISHED THROUGH COURSE OF DEALING AS THE GEOGRAPHIC LOCATION AT WHICH THE WHOLESALER TAKES DELIVERY OF THE ITEM OF BEER, THE TERM "state taxes and fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon a gallon or liter of such alcohol and spirits or each barrel, or fractional unit thereof, of beer and the term "gallon" shall mean one hundred twenty-eight fluid ounces and the term "liter" shall mean one thousand milliliters and the term "barrel" means not less than twenty-eight nor more than thirty-one gallons. A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes AND PACKAGES, approved by the department of liquor control, or his brand which he offers to any wholesaler in any state bordering this state.

Sec. 2. Subsection (a) of section 30-17 of the general statutes is repealed and the following is substituted in lieu thereof:

(a) (1) A wholesaler permit shall allow the bottling of alcoholic liquor and the wholesale sale of alcoholic liquor to permittees in this state and without the state, as may be permitted by law, and the sale of alcoholic liquors to vessels engaged in coastwise or foreign commerce, and the sale of alcohol and alcoholic liquor for industrial purposes to nonpermittees, such sales to be made in accordance with the regulations prescribed by the department of liquor control, and the sale of alcohol and alcoholic liquor for medicinal purposes to hospitals and charitable institutions and to religious organizations for sacramental purposes and the receipt from out-of-state shippers of multiple packages of still wines and sparkling wines. The holder of a wholesaler permit may apply for and shall thereupon receive an out-of-state shipper's permit for direct importation from abroad of alcoholic liquors manufactured outside the United States and an out-of-state shipper's permit for direct importation from abroad of beer manufactured outside the United States.

(2) When a holder of a wholesale permit has had the distributorship of any alcohol, beer, spirits or wine product of a manufacturer or out-of-state shipper or their successors or assigns for six months or more, such distributorship may be terminated or its geographic territory diminished upon (A) the execution of a written stipulation by the wholesaler and manufacturer or out-of-state shipper or their successors or assigns agreeing to the change and the approval of such change by the department of liquor control; or (B) the sending of a written notice by registered mail, return receipt requested, by the manufacturer or out-of-state shipper or their successors or assigns to the wholesaler, a copy of which notice has been sent simultaneously by registered mail, return receipt requested, to the department of liquor control. No such termination or diminishment shall become effective except for just and sufficient cause, provided such cause shall be set forth in such notice and the department of liquor control shall determine, after hearing, that just and sufficient cause exists. If an emergency occurs, caused by the wholesaler, prior to such hearing, which threatens the manufacturer's or out-of-state shipper's or their successor's or assign's products or otherwise endangers the business of the manufacturer or out-of-state shipper or their successors or assigns and said emergency is established to the satisfaction of the department of liquor control, the department may temporarily suspend such wholesaler permit or take whatever reasonable action the department deems advisable to provide for such emergency and the department may continue such temporary action until its decision after a full hearing. The department of liquor control shall render its decision with reasonable promptness following such hearing. Notwithstanding the aforesaid, a manufacturer or out-of-state shipper or their successors or assigns may appoint one or more additional wholesalers as the distributor for an alcohol, [beer,] spirits or wine product within such territory, provided [with regard to alcohol, spirits or wine products] such appointment shall not be effective until six months [, and with regard to beer products one year,] from the date such manufacturer or out-of-state shipper or their successors or assigns shall set forth such intention in written

notice to the existing wholesaler by registered mail, return receipt requested, with a copy of such notice simultaneously sent by registered mail, return receipt requested, to the department of liquor control. FOR JUST AND SUFFICIENT CAUSE, A MANUFACTURER OR OUT-OF-STATE SHIPPER OR THEIR SUCCESSORS OR ASSIGNS MAY APPOINT ONE OR MORE ADDITIONAL WHOLESALERS AS THE DISTRIBUTOR FOR A BEER PRODUCT WITHIN SUCH TERRITORY PROVIDED SUCH MANUFACTURER OR OUT-OF-STATE SHIPPER OR THEIR SUCCESSORS OR ASSIGNS SHALL SET FORTH SUCH INTENTION AND CAUSE IN WRITTEN NOTICE TO THE EXISTING WHOLESALER BY REGISTERED MAIL, RETURN RECEIPT REQUESTED, WITH A COPY OF SUCH NOTICE SIMULTANEOUSLY SENT BY REGISTERED MAIL, RETURN RECEIPT REQUESTED, TO THE DEPARTMENT OF LIQUOR CONTROL. For the purposes of this section, just and sufficient cause means the existence of circumstances which, in the opinion of a reasonable person considering all of the equities of both the wholesaler and the manufacturer or out-of-state shipper or their successors or assigns, warrants a termination or a diminishment of a distributorship as the case may be.

(3) Nothing contained herein shall be construed to interfere with the authority of the department of liquor control to retain or adopt reasonable regulations concerning the termination or diminishing of a distributorship held by a wholesaler for less than six months.

(4) ALL HEARINGS HELD HEREUNDER SHALL BE HELD IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER 54.

Sec. 3. This act shall take effect from its passage.

Certified as correct by

_____

Legislative Commissioner.

_____

Clerk of the Senate.

_____

Clerk of the House.

Approved _____, 1984

_____

Governor, State of Connecticut.

APPENDIX F

Sec. 30-6-B4a. Time of posting

(a) Price schedules filed on or before the sixth day of January pursuant to Section 30-6-B4 (a) shall be deemed posted on the sixth day of January at 10:00 a.m. Eastern Standard Time. If the sixth day of January is a Saturday, Sunday or legal holiday, price schedules shall be filed on the next business day and shall be deemed posted on such next business day at 10:00 a.m. Eastern Standard Time.

(b) In accordance with Section 30-6-B4 (c), such price schedule shall be deemed re-posted, unless a timely supplemental price schedule is filed, on the sixth day of each succeeding month at 10:00 a.m. Eastern Standard Time. If the sixth day of any succeeding month is a Saturday, Sunday or legal holiday, the price schedule shall be deemed reposted at 10:00 a.m. Eastern Standard Time on the next business day.

(c) Supplemental price schedules filed on the sixth day of any month shall be deemed posted at 10:00 a.m. Eastern Standard Time on that day and re-posted on the sixth day of each succeeding month at 10:00 a.m. Eastern Standard Time. If the sixth day of any month is a Saturday, Sunday or legal holiday, such supplemental price schedule shall be filed on the next business day, and shall be deemed posted or reposted, as the case may be, at 10:00 a.m. Eastern Standard Time, on such day.

(d) Any price schedule or supplemental price schedule filed late shall be ineffective for that month and shall be applicable for the next filing deadline. Any price schedule or supplemental price schedule filed early shall be applicable for the pending filing deadline.

(Effective October 21, 1985)

(2) (2)

Supreme Court, U.S.
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CLERK

Nos. 88-449, 88-513

IN THE

United States Supreme Court

OCTOBER TERM, 1988

JOHN F. HEALY, *et al.*,
Appellants

v.

THE BEER INSTITUTE, *et al.*,
Appellees

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.,
Appellant

v.

THE BEER INSTITUTE, *et al.*,
Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR SUMMARY AFFIRMANCE

JEFFREY I. GLEKEL
Counsel of Record,
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 735-3000
Attorneys for Plaintiff Anheuser-Busch, Inc.
Of Counsel
Timothy G. Reynolds
Gary B. Friedman

GARY NATEMAN, ESQ.
The Beer Institute
1750 K Street, N.W.
Washington, D.C. 20006
(202) 737-2337
Attorney for Plaintiff The Beer Institute

JEROME I. CHAPMAN
Counsel of Record,
ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700
Attorneys for Plaintiff Miller Brewing Company
Of Counsel
Wayne C. Holcombe

WILLIAM H. ALLEN
Counsel of Record,
COVINGTON & BURLING
1201 Pennsylvania, N.W.
Washington, D.C. 20044
(202) 662-6000
Attorneys for Plaintiffs The Beer Institute, G. Heileman Brewing Company, The Genessee Brewing Company, Inc. All Brand Importers, Inc., Dribeck Importers, Inc., Guiness-Harp Corp., Labatt Importers Inc., Martlett Importing Company, Inc. Monterey Bay Company, Inc., and Van Munching and Company, Inc.

October 14, 1988

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ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR SUMMARY AFFIRMANCE

Appellees, The Beer Institute and certain brewers and beer importers,[1] respectfully move this Court for an order summarily affirming the judgment of the United States Court of Appeals for the Second Circuit in this action. The court of appeals held that amended Sections 30-63a(b), 30-63b(b) and 30-63c(b) of The Connecticut Liquor Control Act (the "beer price affirmation law")[2] constituted extraterritorial regulation by the State of Connecticut of the price of beer in the bordering states of Massachusetts, New York and Rhode Island and therefore were invalid under the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3.

In 1983, this Court summarily affirmed a decision of the Second Circuit which held that the original beer price affirmation provisions of the Connecticut Liquor Control Act constituted impermissible extraterritorial regulation in violation of the Commerce Clause. *United States Brewers Ass'n* v. *Healy,* 692 F.2d 275 (2d Cir. 1982), *aff'd per curiam,* 464 U.S. 909 (1983) ("*Healy I*"). In 1984, the Connecticut legislature adopted certain technical amendments purportedly designed to correct the deficiencies found in *Healy I.* The Second Circuit, however, in the decision below, held that the Connecticut statute as amended continues to control the prices at which goods are sold in other states in violation of the Commerce Clause. *Beer Institute* v. *Healy,* 849 F.2d 753 (1988). Summary affirmance is appropriate because that decision is manifestly correct.

The court of appeals correctly applied the controlling precedents, including this Court's recent decisions invalidating other price affirmation statutes on the same grounds. *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority,*

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[1] The Appendix to this motion contains the list required by Supreme Court Rule 28.1 of the appellees and their parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates.

[2] The Connecticut beer price affirmation provisions and price posting statute, Conn. Liquor Control Act § 30-63, are set out in their entirety at pages 3 through 6 of the Connecticut Jurisdictional Statement.

476 U.S. 573 (1986); *Healy I.* Appellants cannot and do not show that this case raises any substantial questions requiring full briefing and oral argument for their disposition.

PRELIMINARY STATEMENT

Connecticut's revised beer price affirmation law requires brewers to post prices on the sixth of each month to take effect on the first of the following month, and requires that all sales during that month be at the posted prices then in effect. Under the price affirmation provisions at issue in *Healy I,* brewers were required to affirm at the time of posting that their posted prices were no higher than the lowest prices they would charge during the effective period for the same items in the states bordering Connecticut. The court of appeals held that because the provisions had the practical effect of controlling for each future month the prices that brewers could charge to wholesalers in other states, the Connecticut law conflicted with "well-established Commerce Clause principles [that] prohibit the state from controlling the prices set for sales occurring wholly outside its territory." *Healy I,* 692 F.2d at 282.

The 1984 amendments to Connecticut's affirmation law provide that, at the time of posting, the brewer must affirm that the posted price is no higher than the lowest price then being offered anywhere in the border states. 1984 Conn. Acts 332. The amended statute purports to allow brewers to lower prices in the border states during the course of the calendar month covered by the posting. Section 30-63b(e). However, as the court of appeals recognized, no practical change was accomplished by the 1984 amendments. Because of the interrelation between the laws of the bordering states and the Connecticut law, it is simply untrue that brewers are free to lower their prices in the border states after posting their prices in Connecticut. Under the current price affirmation scheme – precisely as under the previous scheme – brewers are forced to set their border state prices according to the price to be posted in Connecticut. Conn. Jur. St. at 10A-12A.

The present appeal is no more substantial than that summarily rejected in *Healy I* and presents an even stronger case for summary affirmance.

First, there is no dispute as to the governing principle of law. As Appellants correctly acknowledge, "[i]t is well settled that the practical effect is the critical consideration in determining whether a statute escapes its borders to control liquor prices in other states." Conn. Jur. St. at 12. *See* Wholesalers' Jur. St. at 24-25. This Court recently reaffirmed this rule in striking down New York's price affirmation law in *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority,* 476 U.S. 573, 583 (1986).

Second, Connecticut's statute has the practical effect of regulating brewers' prices in the bordering states by tying the maximum permissible price for a brand and package of beer in Connecticut to the minimum prices at which a brewer offers the same item anywhere in those other states. Moreover, it is obvious that controlling out-of-state prices is essential to Connecticut's acknowledged purpose for the law – "increasing the purchase of beer by Connecticut residents within the state and generating increased tax revenues for the state" by stopping the flow of "Connecticut residents [who] have crossed state borders in significant numbers to purchase beer in other states at lower retail prices." Conn. Jur. St. at 7, 8, 16. The court of appeals thus correctly held that the obvious extraterritorial effects of Connecticut's beer price affirmation statute were "purposeful." Conn. Jur. St. at 13A.

Third, this case does not present any issue concerning the scope or continuing validity of *Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 384 U.S. 35 (1966). Regardless of whether *Seagram* might be relevant to the constitutional analysis of some hypothetical statute, the present case is clearly controlled by *Brown-Forman* and *Healy I.*

ARGUMENT

POINT I

THE COURT OF APPEALS CORRECTLY HELD THAT THE AMENDED PRICE AFFIRMATION PROVISIONS UNCONSTITUTIONALLY REGULATE COMMERCE OUTSIDE CONNECTICUT

In *Brown-Forman,* this Court invalidated New York's price affirmation statute on the ground that, *inter alia,* the statute unconstitutionally constrained the pricing flexibility of the plaintiff distillers outside of New York. 476 U.S. at 583. Since *Brown-Forman,* courts have unanimously declared other price affirmation statutes to be extraterritorial regulation in violation of the Commerce Clause.[3]

Similarly, in this case the court of appeals held Connecticut's amended price affirmation statute unconstitutional on the ground that it "inevitably exercises control over 'the prices set for sales occurring wholly outside its territory.' " Conn. Jur. St. at 8A (quoting *Healy I,* 692 F.2d at 282). As the court of appeals correctly noted, under the Commerce Clause, "the critical consideration is the overall effect of the statute on both local and interstate activity." *Id.* at 9A, quoting *Brown-Forman, supra,* 476 U.S. at 579. The court of appeals also observed that this Court has consistently recognized that "the interaction of the statute with the regulatory schemes of neighboring states constitutes an 'overall effect' which appropriately is considered." Conn. Jur. St. at 9A. *See Kassel* v. *Consolidated Freightways Corp.,* 450 U.S. 662, 671 (plurality opinion); *Raymond Motor Transp., Inc.*

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[3] *See Brown-Forman Corp.* v. *Delaware Alco. Bev. Con. Comm'n,* No. 87-20 LON, slip op. (D. Del. Dec. 17, 1987) (striking down statute requiring price affirmation at time of sale); *Brown-Forman Corp.* v. *New Mexico Dep't of Alco. Bev. Cont.,* 672 F. Supp. 1383 (D.N.M. 1987); *Brown-Forman Corp.* v. *Tennessee Alco. Bev. Comm'n,* No. 3-86-0926, slip op. (M.D. Tenn. June 30, 1987) (available on WestLaw, Allfeds database); *Brown-Forman Corp.* v. *South Carolina Alco. Bev. Comm'n, 643 F. Supp. 943 (D.S.C. 1986).*

v. *Rice,* 434 U.S. 429, 445 (1978); *Bibb* v. *Navajo Freight Lines, Inc.,* 359 U.S. 520, 527-28 (1959); *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 774-75 (1945).[4]

There is no dispute about how the Connecticut statute interacts with the regulatory schemes of the border states in a manner which controls the pricing decisions of brewers in those states. The court of appeals analyzed three aspects of this interaction.

First, Massachusetts regulations require brewers to post their prices on the first day of each month to become effective on the first day of the following month. Once posted, these prices cannot be changed. Mass. Gen. Laws Ann. ch. 138, § 25B. As discussed above, Connecticut's revised price affirmation law requires brewers to affirm on the sixth day of each month that the prices they will charge for the entire following month will be at least as low as the lowest price they are charging in any border state at the time of affirming. Therefore, when a brewer posts his February prices in Massachusetts on January 1, he must consider the prices he will be compelled to charge in Connecticut throughout the month of March. The Massachusetts price cannot be changed on February 7 after the affirmation required by Connecticut's law; it remains in effect for the entire month of February. As the court of appeals concluded, "[a] brewer can therefore undertake competitive pricing based on the market realities of Massachusetts or Connecticut but not both, because the Connecticut statute ties pricing to the regulatory schemes of the border states." Conn. Jur. St. at 10-A.

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[4] Connecticut fails in its attempts to distinguish the above-cited cases on the ground that they involve transportation and that the regulation of transportation necessarily requires greater interstate uniformity and admits of less local control than does the regulation of alcohol distribution. (*See* Conn. Jur. St. at 12). These considerations only indicate that local transportation regulations may have the *practical effect* of extraterritorially regulating commercial activity. In the instant case, it cannot and has not been seriously disputed that the *practical effect* of the Connecticut statute is to regulate commercial activity outside of Connecticut. As *Brown-Forman* confirms, the subject matter of a statute has no bearing upon whether, as a practical matter, the statute regulates commerce in another state.

Second, New York law requires that a promotional discount must be maintained for at least 180 days before prices can be raised. *See* N.Y. Alco. Bev. Cont. Law § 55-b(2) (McKinney 1987). The court of appeals correctly found that the practical effect of the Connecticut law is to deter such discounts from being offered in any market in New York,[5] because they must automatically be offered as the regular price everywhere in Connecticut for the full 180 days plus an additional one month beyond the termination of the New York promotion, regardless of local competitive conditions in Connecticut. Conn. Jur. St. at 10A-11A.

Third, volume discounts are permitted in Massachusetts, New York and Rhode Island, but are not allowed in Connecticut. The practical effect of Connecticut's price affirmation law is, therefore, to deter volume discounts anywhere in those states because the discounts would then have to be offered as the regular price for an entire month everywhere in Connecticut, where they may not be warranted by competitive conditions. Conn. Jur. St. at 12A.

Plainly, the practical effect of the Connecticut price affirmation law is to inhibit brewers from undertaking competitive pricing in the bordering states based solely on local market realities. Instead, when establishing their prices in Massachusetts, New York and Rhode Island, the brewers are constrained by the prices they will be compelled to charge in Connecticut throughout the month following each affirmation. Connecticut "has 'project[ed] its legislation' into other States, . . . directly regulated commerce therein," and deprived businesses and consumers in those states of "whatever competitive advantages they may possess" based on local market conditions, in contravention of established Commerce Clause principles. *Brown-Forman, supra,* 476 U.S. at 580, 584.

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[5] Unlike Connecticut, which mandates a uniform statewide price, New York law permits brewers to establish different prices based on conditions in different local markets. The Wholesalers' repeated unsupported assertions to the contrary, Wholesalers' Jur. St. at 20-23, are simply wrong.

A. *Brown-Forman* and Prior Decisions Invalidating Efforts of States To Control Commerce Beyond Their Borders Establish the Unconstitutionality of the Price Affirmation Provisions

The court of appeals' holding that the Connecticut law's control of prices outside Connecticut is prohibited by the Commerce Clause correctly applied this Court's decisions in *Brown-Forman, Healy I,* and a long line of prior cases. *See, e.g., Edgar v. MITE Corp.,* 457 U.S. 624, 642-43 (1981) (plurality opinion); *Schwegmann Bros. Giant Super Markets* v. *Louisiana Milk Comm'n,* 416 U.S. 922 (1974) (*per curiam*), *aff'g* 365 F. Supp. 1144 (N.D. La. 1973); *Southern Pacific Co.* v. *Arizona, supra,* 325 U.S. at 775; *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U.S. 511, 524, 528 (1935).

In *Brown-Forman,* this Court struck down a New York price affirmation law which required distillers to post their prices to New York wholesalers for the following month and affirm that those prices were no higher than the lowest prices they would charge any wholesalers anywhere in the United States during that month. 476 U.S. at 576, 582. The Court emphasized that the determinative issue was whether "the 'practical effect' of the law is to control liquor prices in other states." *Id.* at 583. After assessing the New York law's practical effects – including specifically the effects of its interaction with the regulatory schemes of other states – the Court concluded that the New York statute effectively prevented distillers from lowering their prices in other states after posting in New York and so exercised an impermissible extraterritorial effect in violation of the Commerce Clause.[6] *Id.* at

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[6] The Court noted that the specific controversy that gave rise to the lawsuit involved New York's (i) refusal to permit distillers to offer promotional allowances that are permitted in other states and (ii) its defining "effective price" for purposes of price affirmation differently from other states. The Court observed that, as a result of the interaction of these laws, the New York law "can effectively force [the seller] to abandon its promotional allowance program in states in which this program is legal, or force those other states to alter their own regulatory schemes . . . ." 476 U.S. at 584.

583-84. The Court also noted its agreement with its prior ruling in *Healy I* that a beer price affirmation statute which has the practical effect of controlling beer prices in other states is unconstitutional. *Id.* at 582.

Brown-Forman and *Healy I* followed a long series of rulings by this Court confirming the proposition that states may not adopt laws that have the practical effect of regulating economic activity outside their borders. For example, in *Edgar* v. *MITE Corp.*, 457 U.S. 624, 642-43 (1981) (plurality opinion), in which the Court struck down an Illinois statute that regulated interstate corporate takeovers of non-Illinois corporations, Justice White noted that the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." In *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 775 (1945), this Court struck down an Arizona law limiting the length of railroad trains because the "practical effect of such regulation is to control train operations beyond the boundaries" of Arizona. Similarly, in *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), the Court struck down a New York law that banned the sale in New York of milk purchased outside of that state if the purchase price fell below a minimum established by New York. The Court held that one state "has no power to project its legislation into . . . [another state] by regulating the price to be paid in that state for milk acquired there," *id.* at 521, or by attempting "to neutralize economic advantages belonging to" another state. *Id.* at 528. *See also Schwegmann Bros. Giant Super Markets* v. *Louisiana Milk Comm'n,* 416 U.S. 922 (1974) (*per curiam*), *aff'g* 365 F. Supp. 144 (M.D.La. 1973), summarily affirming a decision striking down a Louisiana statute which had the practical effect of regulating milk

prices in other states by preventing the sale in Louisiana of milk purchased out-of-state when the purchase price fell below the minimum set by Louisiana.[8]

The court of appeals carefully applied these precedents to assess the practical effects of the Connecticut affirmation law's interactions with the bordering states' beer regulations. In so doing, it correctly reached the same conclusion reached by this Court in *Healy I* and *Brown-Forman*: Connecticut's law exercises an impermissible effect on beer prices in other states in violation of the Commerce Clause.

B. Appellants' Arguments for Sustaining the Revised Price Affirmation Provisions are Without Merit

Appellants do not challenge the precedents relied on by the court of appeals or that court's application of those precedents to the obvious extraterritorial effects of the Connecticut statute. Instead, Appellants make three arguments which are totally lacking in substance.

First, appellants argue that, notwithstanding the extraterri torial effects, Connecticut's price affirmation law does not violate the Commerce Clause because those effects result not from the Connecticut law itself, but from the interaction of the law with the various beer pricing provisions of the border states. It is only the Connecticut law, however, which purposefully crosses state lines by referencing out-of-state prices when regulating beer prices for Connecticut. If Connecticut did not persist in tying maximum in-state beer prices to the lowest beer prices in neighboring states, the price regulations in its neighboring states would not contribute to the undis-

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[8] *CTS Corp.* v. *Dynamics Corp. of America,* U.S. , 107 S. Ct. 1637 (1987), which the Wholesalers argue is a new departure in this Court's Commerce Clause jurisprudence, Wholesalers' Jur. St. at 25-26, is entirely consistent with the precedents discussed above. In *CTS,* the Court upheld the validity of Indiana's "takeover statute" under the Commerce Clause precisely because it did *not* reach across state borders to regulate non-Indiana corporations. 107 S. Ct. at 1649. By contrast, Connecticut's beer price affirmation law purposefully reaches across borders to affect beer prices in neighboring states.

puted extraterritorial effects. As the Court stated in *Brown-Forman,* by its affirmation legislation "New York can effectively force appellant to abandon its promotional allowance program in States in which that program is legal, or force those other States to alter their own regulatory schemes . . . ." 476 U.S. at 584. In the same manner, Connecticut has purposefully interjected itself into the regulatory affairs of other states by deterring competitive pricing in those states in violation of basic Commerce Clause principles.

Second, Connecticut argues that it "has done all that it can" to enact a constitutional price affirmation statute when in 1984 it added a new provision which states that the Connecticut law "shall not prohibit a manufacturer . . . from changing prices to any wholesaler in any other state . . . at any time during the calendar month covered by such posting." Conn. Jur. St. at 12; Conn. Gen. Stat. § 30-63b(e). Connecticut's argument misses the point because this technical amendment was a mere cosmetic change to the Connecticut law which left the practical effects of its interaction with the bordering states' beer regulations unchanged. The court of appeals correctly found no significance in this amendment.

Moreover, Connecticut is surely being disingenuous when it argues that it has done all it can to stop regulating beer prices in the bordering states. In fact, Connecticut makes clear that its statute was designed to stem the flow of Connecticut residents crossing state lines "to purchase beer in other states at lower prices" by attempting to eliminate the fact that "[h]istorically, the retail price of beer has been generally higher in Connecticut than in the bordering states . . . ." *See,* Conn. Jur. St. at 7, 8, 16. If the brewers were really free to change their prices in the bordering states after affirmation in Connecticut – which they are not because of the interaction discussed above – Connecticut's beer price affirmation law would not and, indeed, could not have the effect intended by the State. Connecticut does not seriously dispute the fact that, as the court of appeals noted,

the practical effects of the Connecticut law's interaction with the bordering states' beer regulations are "purposeful." Conn. Jur. St. at 13A.[8]

Third, Appellants claim that Connecticut's attempted extraterritorial legislation is somehow saved by this Court's decision in *Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 384 U.S. 35 (1966). Not surprisingly, appellants do not explain how *Seagram* supports the statute at issue here. Unlike the price affirmation statute upheld in *Seagram,* the Connecticut statute is not "retrospective" in nature. Conn. Jur. St. at 13A. Therefore, like the statute at issue in *Brown-Forman,* Connecticut's law is neither validated by *Seagram* nor does it present any issue concerning the continuing validity of *Seagram. See Brown-Forman, supra,* 476 U.S. at 584 n.6.

Moreover, *Seagram* was decided in a unique context in which the statute at issue had not yet been put into effect. *Seagram, supra,* 384 U.S. at 43. At that time, "affirmation statutes were comparatively new," *Brown-Forman, supra,* 476 U.S. at 586 (Blackmun, J., concurring), and their practical effects could not be foreseen. The *Seagram* Court noted that "it is possible that specific future applications of . . . [the retrospective statute] may engender concrete problems of constitutional dimension," which it would deal with as they arose. 384 U.S. at 52. Here, the practical effects of the Con-

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[8] Even if brewers were, in fact, free to change their prices in Massachusetts, New York and Rhode Island *after* they had posted and affirmed their prices in Connecticut – which they are not – it would make no constitutional difference. Connecticut's law would still have an impermissible extraterritorial effect on beer prices in other states on the day of affirmation. As the district court said in striking down New Mexico's price affirmation statute:

> "Whether the extraterritorial effect of price affirmation legislation is directed to the past, to the future or to the instant of posting prices is of no constitutional consequence. 'It is not the timing of the extraterritorial effect but the fact that it takes place which the Supreme Court has declared invalid.' " *Brown-Forman Corp.* v. *New Mexico Dep't of Alco. Bev. Cont., supra* n.3, 672 F. Supp. at 1386.

necticut statute's interaction with the beer regulations of Massachusetts, New York and Rhode Island are clear and indistinguishable from the practical effects of the statutes struck down in *Brown-Forman* and *Healy I.* The court of appeals, therefore, correctly concluded that it would

> " . . . decline to *extend* the *Seagram* precedent to validate a simultaneous affirmation provision that, by its purposeful interaction with border-state regulatory schemes, operates to control prices beyond Connecticut's borders." Conn. Jur. St. at 13A (emphasis in original).

POINT II

CONNECTICUT'S EXTRATERRITORIAL CONTROL OF BEER PRICING IS NOT PROTECTED BY THE TWENTY-FIRST AMENDEMENT

Appellants repeat the same proposition already rejected by this Court in *Brown-Forman, supra,* 476 U.S. at 584-85, and *Healy I, supra,* 692 F.2d at 281, *aff'd per curiam,* 464 U.S. 909 (1983), that an extraterritorial price affirmation statute is somehow excused by the Twenty-first Amendment. As the court of appeals correctly held, this amendment reserves to the states the power to regulate " '*transportation* or *importation*' of liquor '*into* any [s]tate . . . for delivery or use *therein,*' " but does not give any state the power to control the price of liquor in other states. Conn. Jur. St. at 13A-14A (emphasis in original). Furthermore, Connecticut's reading of the Twenty-first Amendment would permit one state's exercise of its rights under this amendment to interfere through extraterritorial legislation in another state's exercise of the same rights, thus defeating the purpose of the amendment. *Id.; Brown-Forman, supra,* 476 U.S. at 585. Finally, Connecticut has not attempted to justify its price affirmation statute on the basis of a purpose to reduce beer consumption or combat any perceived evil of an unrestricted traffic in beer. Instead, Connecticut proclaims that the stat-

ute is designed to encourage Connecticut residents to purchase beer in Connecticut instead of the border states, thereby increasing Connecticut's tax revenues. Conn. Jur. St. at 7-8. Such legislation, when challenged as violative of the Commerce Clause, is not saved by the Twenty-First Amendment. *Bacchus Imports, Ltd.* v. *Dias,* 468 U.S. 263, 276 (1984).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed summarily.

Respectfully submitted,

JEFFREY I. GLEKEL
Counsel of Record,
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 735-3000

Attorneys for Plaintiff
Anheuser-Busch, Inc.

Of Counsel
Timothy G. Reynolds
Gary B. Friedman

WILLIAM H. ALLEN
Counsel of Record,
COVINGTON & BURLING
1201 Pennsylvania, N.W.
Washington, D.C. 20044
(202) 662-6000

Attorneys for Plaintiffs
The Beer Institute,
G. Heileman Brewing
Company,
The Genessee Brewing
Company, Inc.
All Brand Importers, Inc.,
Dribeck Importers, Inc.,
Guiness-Harp Corp.,
Labatt Importers Inc.,
Martlett Importing
Company, Inc.
Monterey Bay Company,
Inc., and
Van Munching
and Company, Inc.

JEROME I. CHAPMAN
Counsel of Record,
ARNOLD & PORTER
1200 New Hampshire
Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Attorneys for Plaintiff
Miller Brewing Company

Of Counsel
Wayne C. Holcombe

GARY NATEMAN, ESQ.
The Beer Institute
1750 K Street, N.W.
Washington, D.C. 20006
(202) 737-2337

Attorney for Plaintiff
The Beer Institute

APPENDIX

Listing Required by Rule 28.1 of Appellees and Their Parent Companies, Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates

Appellee The Beer Institute includes the following member corporations who are appellees in this case: Anheuser-Busch, Inc.; Miller Brewing Company; Latrobe Brewing Company; Pabst Brewing Company; and The Stroh Brewery Company.

Individual appellees include the following corporations: Anheuser-Busch, Inc.; Miller Brewing Company; G. Heileman Brewing Company; The Genessee Brewing Company, Inc.; All Brand Importers, Inc.; Dribeck Importers, Inc.; Guinness-Import Company, Inc.; Labatt Importers, Inc.; Martlett Importing Company, Inc.; Monterey Bay Company, Inc.; and Van Munching and Company, Inc.

The parent companies, subsidiaries (other than wholly-owned) and affiliates of each member of The Beer Institute, and of each individual corporate appellee are listed below under the name of the related association member or individual appellee:*

All Brand Importers, Inc.

Parent—Heublein, Inc.

Anheuser-Busch, Inc.

Parent—Anheuser-Busch Companies, Inc.

Subsidiaries and Affiliates—St. Louis National Baseball Club, Inc.; International Label Co.; Sports Time; Budweiser of Asheville; Golden Eagle Distributing Co. of Los Angeles; Ballygowan Spring Water Co., Ltd.

Dribeck Importers, Inc.

Parent, subsidiaries and affiliates—None

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* Based on information provided by the companies.

The Genessee Brewing Company

Parent—Genessee Corporation

G. Heileman Brewing Company, Inc.

Parent—Bond Corporation Holding, Ltd.

Guinness-Import Company, Inc.

Parent—Guinness, PLC

Labatt Importers, Inc.

Parent—Labatt's USA

Latrobe Brewing Company

Parent--Labatt's USA

Martlett Importing Company, Inc.

Parent—The Molson Breweries of Canada, Ltd.

Miller Brewing Company

Parent—Philip Morris Companies, Inc.

Monterey Bay Company

Parent—McKesson Corporation of Maryland

Pabst Brewing Company

Parent—S & P Company

The Stroh Brewing Company

Parent—The Stroh Companies, Inc.

Van Munching & Company

Parent, subsidiaries and affiliates—None

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No. 88-513 (3)

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

WINE & SPIRITS WHOLESALERS OF CONNECTICUT, INC.
Appellants,

v.

THE BEER INSTITUTE, et al.
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR APPELLANTS

WILLIAM A. WECHSLER
BAILEY AND WECHSLER
Counsel of Record
(A Member of the Bar of the U.S. Supreme Court)

ALFRED F. WECHSLER
GREGORY J. SOUTHWORTH
BAILEY AND WECHSLER

66 Forest Street
Hartford, CT 06105
Telephone: (203) 525-9191

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No. 88-513

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OCTOBER TERM, 1988

WINE & SPIRITS WHOLESALERS OF CONNECTICUT, INC.
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Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARGUMENT

The United States Court of Appeals for the Sixth Circuit in *Brown-Forman Corporation v. Tennessee Alcoholic Beverage Commission*, Nos. 87-5870/87-5913, slip op. (6th Cir. Nov. 4, 1988), hereinafter "*Brown-Forman v. Tennessee*," has recently upheld the constitutionality of Tennessee's liquor affirmation law — a law similar to Connecticut's affirmation law which is at issue in this appeal. In that the above case was decided following the filing of Appellants' Jurisdictional Statement, a copy is provided herewith in an Appendix to this Supplemental Brief.

The Tennessee law, like Connecticut's, is a liquor affirmation statute which requires that a manufacturer of alcoholic beverages may not charge or quote a price that is higher than any wholesale price currently charged by the manufacturer in another state. The relevant provision provides:

> The affirmation shall certify that the manufacturer, distiller, rectifier, factor, broker or vintner shall not willfully sell or offer for sale any alcoholic spirituous beverage or vintage alcoholic beverages of a particular brand, proof or size, in Tennessee at a price higher than the price such liquors are sold or offered for sale to licensed wholesalers in any other state in the United States.

Tenn. Code Ann. Section 57-3-202(e) (2).

The Tennessee statute is a "contemporaneous" or "simultaneous" affirmation statute, similar to the Connecticut statute which requires that at a precise moment in time — the moment of posting — the price charged to Connecticut wholesalers is no higher than the lowest price charged to wholesalers in a neighboring state. The Tennessee law was challenged on the grounds that the practical effect of the law was to control liquor prices in other states. The Sixth Circuit Court of Appeals, in contrast to the Second Circuit in the instant appeal, found that Tennessee's affirmation law did not make price changes in other states illegal nor purport to regulate prices in other states. Similarly, Connecticut's affirmation law should be upheld in that the statute does not make price changes in other states illegal nor purport to regulate prices in other states. Conn. Gen. Stat. Section 30-63b(e).

The Sixth Circuit also found that any effect on interstate commerce resulting from an affirmation statute that purports to prohibit discriminatory prices is certainly less onerous than an absolute prohibition on the sale of liquor as sanctioned by the Twenty-First Amendment. *Brown-Forman v. Tennessee*, at pp. 5a, 8a. Further, the Court found that such interstate

effects do not necessarily invalidate a statute, especially when the products come within the purview of the Twenty-First Amendment. *Id.* at p. 6a, *citing Exxon Corp. v. Maryland*, 437 U.S. 117, 127-8 (1978).

The Sixth Circuit reasoned that although the Tennessee statute may discourage out-of-state price reductions in that such price changes must be replicated in Tennessee, the statute is constitutional because it does not prohibit price changes in other states. *Brown-Forman v. Tennessee*, at p. 8a. Thus the Court found that while the statute may affect manufacturers' profits in the interstate market, the statute does not make price changes in any other state illegal. *Brown-Forman v. Tennessee*, at p. 10a.

Similar to the statute upheld by the Sixth Circuit, the Connecticut statute does not prohibit price changes in neighboring states. The Sixth Circuit therefore correctly concluded, as the Second Circuit should have concluded, that while such an affirmation statute may affect the interstate liquor market, this does not constitute "regulation" of liquor prices in other states.

The Sixth Circuit appropriately found that while the Tennessee statute may require a manufacturer to raise prices in other states in order to effectively raise prices in Tennessee, "it is by no means clear . . . that [Tenn. Code Ann. Section 57-3-202(e)] must inevitably produce higher prices in other States . . . rather than the lower prices sought for Tennessee." *Brown-Forman v. Tennessee* at p. 8a, paraphrasing *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 43 (1966). As the Sixth Circuit found, even assuming such theoretical effects on the interstate liquor market, Appellants never produced evidence of the alleged market distortions or effects on prices in other states. Similarly, the Appellee-Brewers in this appeal have never produced a scintilla of evidence supporting their claims of market distortions or disadvantages suffered by out-of-state consumers as a result of the Connecticut affirmation statute. In short, the Connecticut

statute, like the Tennessee statute, withstands constitutional scrutiny.

In the Tennessee case, unlike this appeal, there was no claim of "extraterritorial effect" associated with the affirmation law. Nevertheless, the Sixth Circuit found that assuming an interaction of the Tennessee law with other states' laws, the Tennessee statute would still survive constitutional scrutiny. This position contravenes the Second Circuit's opinion in this case which erroneously attributed an extraterritorial effect to the Connecticut statute. Applying the reasoning of the Sixth Circuit, an affirmation statute like Connecticut's is constitutional in that any extraterritorial effect would be attributable to the laws of the neighboring states and the interaction of those statutes, and not the result of an allegedly unconstitutional Connecticut statute.

It is also noteworthy that the Sixth Circuit, unlike the Second Circuit, paid proper deference to Supreme Court precedent in *Seagram* in rendering its decision. While the Second Circuit in the instant case ignored *Seagram*'s application and seemingly attempted to overrule *Seagram*, the Sixth Circuit properly recognized judicial restraint and delineated its role as a Court of Appeals:

> It is also true, however, that courts of appeals "are not empowered to overrule Supreme Court precedent." [*In re The Beer Institute*, 849 F.2d 753, 760 (2d Cir. 1988).] . . . If the Supreme Court should wish to decide whether *Seagram* is still valid, therefore, this would probably be a good case in which to do it. If not, we assume that the lower courts ought to follow *Seagram* in every case to which that decision obviously applies. *Brown-Forman v. Tennessee* at pp. 12-13a.

Appellants reiterate that the Connecticut statute is constitutional under *Seagram* and that the Second Circuit erred and overstepped its authority in effectively attempting to overrule *Seagram*.

Appellants submit this Supplemental Brief and refer the Court to *Brown-Forman v. Tennessee* to demonstrate that the lower circuits are now in conflict on the issue of whether similar liquor affirmation statutes are constitutional under the Commerce Clause of the United States Constitution, U.S. Const., Art. I, Sec. 8, cl. 3 or the Twenty-First Amendment, U.S. Const., Amend. XXI, Sec. 2, or Supreme Court precedent. In light of the above conflict in the lower circuits, the instant appeal poses substantial questions meriting plenary consideration, with briefs on the merits and oral argument for its resolution. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959), *reh. den.* 359 U.S. 999; *International Union, etc. v. Scofield*, 382 U.S. 205 (1965); *United States v. Gilmore*, 372 U.S. 39 (1963); *Camara v. Municipal Court*, 387 U.S. 523, 525 (1967).

CONCLUSION

For the reasons stated above and those earlier presented in Appellants' Jurisdictional Statement filed September 12, 1988, we urge this Court to note probable jurisdiction.

Respectfully Submitted,

Wine & Spirits Wholesalers
of Connecticut, Inc.

/s/ William A. Wechsler

WILLIAM A. WECHSLER
BAILEY AND WECHSLER
Counsel of Record
(A Member of the Bar of
the U.S. Supreme Court)

ALFRED F. WECHSLER
GREGORY J. SOUTHWORTH
BAILEY AND WECHSLER

66 Forest Street
Hartford, CT 06105
Telephone: (203) 525-9191

November 9, 1988

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

Nos. 87-5870/5913

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BROWN-FORMAN CORPORATION,
Plaintiff-Appellee,

v.

TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, et al.,
Defendants-Appellants (87-5913),

LICENSED BEVERAGE WHOLESALERS OF TENNESSEE,
Intervenor-Appellant (87-5870).

ON APPEAL from the United States District Court for the Middle District of Tennessee

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Decided and Filed November 4, 1988

Before: KRUPANSKY and NELSON, Circuit Judges, and HACKETT, District Judge.*

DAVID A. NELSON, Circuit Judge. The laws of the State of Tennessee prohibit any distiller from making a sale of alcoholic beverages to a wholesaler in Tennessee at a price higher

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* The Honorable Barbara Hackett, United States District Judge for the Eastern District of Michigan, sitting by designation.

than that being charged, contemporaneously with the Tennessee sale, to a wholesaler in any other state. Tenn. Code Ann. § 57-3-202(e). The Tennessee statute leaves distillers free to change their out-of-state prices at will, without notice and without the approval of any Tennessee official.

Plaintiff Brown-Forman Corporation, a distiller and national marketer of alcoholic beverages, brought the present action to obtain a declaratory judgment on the constitutionality of the Tennessee statute. In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), the Supreme Court had recently invalidated a New York liquor-pricing statute which was geared to out-of-state prices that had to be certified in advance, and which made it illegal to change the out-of-state prices without New York's approval. Relying principally upon that decision, the district court held that on its face the Tennessee statute violates the Commerce Clause of the United States Constitution.[1] In our opinion, however, the Tennessee law lacks the obvious extraterritorial reach that the New York statute had, and we do not believe the Tennessee statute runs afoul of the negative implications of the Commerce Clause. We are strengthened in this conclusion by the implications of the Twenty-first Amendment, with its constitutional prohibition against the transportation of intoxicating liquors into any state for use in that state "in violation of the laws thereof."

I

In considering whether the Tennessee liquor-pricing law goes further than the Constitution allows, it is important to understand not only what the law says, but also what it does

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[1] The district court did not use the phrase "dormant Commerce Clause," but might well have done. The court believed that the Tennessee statute affects interstate commerce in a way violative of what Mr. Justice Frankfurter called the "negative implications" of the constitutional grant to Congress of the power to regulate commerce among the several states. Extraterritorial legislation is often said to violate the Commerce Clause in its negative, or "dormant," aspect.

not say. Unlike the "affirmation" laws of many other states, the Tennessee statute does not require distillers to affirm that they will comply with price schedules posted in advance.[2] The Tennessee statute does not require any posting of prices. It does not impose any waiting period before prices can be changed. It does not purport to control the timing or amount of out-of-state price changes. And it does not require that governmental approval be obtained before prices are changed within the state, just as it does not require governmental approval before prices are changed outside the state.

All the Tennessee statute does, in essence, is tell distillers that when they sell or offer to sell liquor to a wholesaler in Tennessee, they may not willfully charge or quote a price in excess of any wholesale price currently being charged or quoted by the distiller outside the state. The mechanism by which Tennessee guards against such price discrimination is as follows:

- Before offering any brand of alcoholic beverage for sale to any licensed wholesaler in Tennessee, every manufacturer, distiller, broker, or vintner of any such beverage is required to file with Tennessee's Alcoholic Beverage Commission an "affirmation of corporate policy." Tenn. Code Ann. § 5703-202(e)(1).

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[2] A recent student law review note says that "[a]ll affirmation statutes begin by requiring producers to file monthly schedules listing the prices they will charge distributors in the state during the upcoming month." Note, "Liquor Price Affirmation Statutes and the Dormant Commerce Clause," 86 Mich. L. Rev. 186, 190 (1987). The Tennessee statute is an affirmation statute, but it imposes no such requirement. The Note argues that *all* liquor price affirmation statutes violate the commerce clause." *Id.* at 188. The faulty premise may be immaterial as far as the affirmation laws of many states are concerned — see, *e.g.*, *In re The Beer Institute*, 849 F.2d 753, 760 (2d Cir. 1988), where the Note is cited in connection with a Connecticut statute that did require advance posting of price schedules — but the Note's argument is not to be accepted uncritically in the case of Tennessee.

- The "affirmation of corporate policy" must certify that the seller will "not willfully sell or offer for sale any alcoholic . . . beverages of a particular brand, proof or size, in Tennessee at a price higher than the price [at which] such liquors are sold or offered for sale to licensed wholesalers in any other state in the United States." *Id.*, Subsection (2).[3]

- The term "price" is defined as "platform price at the distillery." Price differentials based on transportation costs are expressly allowed, as are nondistriminatory quantity discounts. *Id.*, Subsection (3). The Alcoholic Beverage Commission also interprets the statute as allowing "promotional discounts" — no-strings credits given to the wholesaler for promotion of the distiller's brands.

- The making of a false affirmation, the failure to file a required affirmation, or the willful violation of the pledges contained therein, may be punished as a misdemeanor and may result in suspension or revocation of the privilege to import and sell alcoholic beverages in Tennessee. *Id.*, Subsections (4) and (5).

The Tennessee statute was enacted in 1975. In June of 1986 the United States Supreme Court handed down its decision in *Brown-Forman, supra*, 476 U.S. 573. The following month Brown-Forman sent the Tennessee Alcoholic Beverage Commission a two paragraph letter stating, in pertinent part:

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[3] The Tennessee Attorney General has ruled that this is a "contemporaneous affirmation requirement" which "means that a supplier must affirm that its prices are no higher than its prices elsewhere *at the very time of sale to a Tennessee wholesaler.*" Tennessee Attorney General Opinion 86-147, p. 5 (Emphasis supplied.)

> "The U.S. Supreme Court's recent decision (*Brown-Forman Distillers Corporation v. New York State Liquor Authority* No. 84-2080, decided June 3, 1986) declaring New York's affirmation statute unconstitutional is applicable to the affirmation law of *all* states and, accordingly, the existing affirmation is hereby withdrawn." (Emphasis in original.)

The Commission forwarded the letter to the Attorney General of Tennessee, requesting an opinion on the issue raised by Brown-Forman. The Attorney General responded with a seven-page opinion letter explaining why Tennessee's statute is distinguishable from New York's and concluding that the Tennessee statute does not contravene the Commerce Clause. The Commission accepted the Attorney General's conclusion, and Brown-Forman was so advised.

Brown-Forman thereupon sued the Commission in the United States District Court for the Middle District of Tennessee, asserting that Tenn. Code Ann. § 57-3-202(e) is unconstitutional and requesting declaratory and injunctive relief. After a two-day trial the district court filed a memorandum opinion holding the statute "facially unconstitutional because of its effect on interstate commerce." The opinion was accompanied by an order permanently enjoining enforcement of the statute. This appeal followed.

II

Whatever the effect on interstate commerce of a state statute prohibiting sales of liquor at discriminatory prices, it could hardly be more direct or more profound than the effect of prohibiting sales of liquor altogether. No state currently does that — notwithstanding William Allen White's tongue-in-cheek prediction that "Kansans will vote dry as long as they can stagger to the polls" — but under the second section of the Twenty-first Amendment,[4] every state may do so. The nega-

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[4] The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

tive implications of the Commerce Clause notwithstanding, every state has "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). The Twenty-first Amendment thus "directly qualifies the federal commerce power," as the Supreme Court recently noted, despite the fact that "the Court has rejected the view 'that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned.' " *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346 (1987), quoting *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 331-32 (1964). (What the *Idlewild* case made clear, as Mr. Justice Stewart said in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 42 (1966), was that "the Twenty-first Amendment has not operated totally to repeal the Commerce Clause in the area of the regulation of traffic in liquor.")

Even where products other than liquor are concerned, state regulation that falls short of complete prohibition does not necessarily impose an impermissible burden on interstate commerce merely because it discourages some out-of-state manufacturers from selling within the state, to the injury of the consuming public. *Exxon Corp. v. Maryland*, 437 U.S. 117, 127-28 (1978). But even in the case of alcoholic beverages, no state is entitled to regulate sales in other states. It is not up to Tennessee to decide whether the sale and consumption of liquor will be prohibited in Kentucky, for example. Whether extraterritorial regulation is ruled out by the negative implications of the Commerce Clause or by "the structure of the Constitution as a whole," as Professor Donald H. Regan argues in his "Siamese Essays," 85 Mich. L. Rev. 1865 and 1884 (1987), it is well settled that although a state "may regulate the sale of liquor within its borders, and may seek low prices for its residents, it may not 'project its legislation into [other States] by regulating the price to be paid' for liquor in those States.' " *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 582-83, 90 L.Ed.2d 552,

562 (1986) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935)).

First and foremost among the questions presented in the case at bar, then, is whether Tennessee has projected its legislation into other states by "regulating" the price to be paid for liquor there. If it has, the district court was correct in holding the legislation unconstitutional.

III

At trial, Brown-Forman presented evidence characterized by the district court as suggesting that Tennessee's statute "distorts the market forces of supply and demand, prevents the use of aggressive price promotion as a marketing tool to attain profit maximization and also impairs the ability to introduce new products in other states." A witness for Brown-Forman maintained that it "was rarely a feasible option" for the company to try to improve out-of-state sales of a slow-moving item by cutting out-of-state prices, because the Tennessee statute would require a corresponding cut in prices in Tennessee even if the item should already be selling well in Tennessee.

The evidence presented by Brown-Forman did not quantify the market distortions attributed to the Tennessee statute. In terms of dollars and cents, both the practical effect of the statute on Brown-Forman's bottom line and the practical effect of the statute on the pocketbooks of consumers within and without the state remain unknown. The district Court thought it clear, nonetheless, that the inevitable tendency of the Tennessee statute would be to control prices in other states:

> "It is clear that if a liquor distiller, such as plaintiff, desires to raise its prices in Tennessee, it must raise its price first in every other state in which the product is sold. Tennessee's affirmation statute works to deny consumers in other states the benefits of a free competitive market . . . ."

This is the basis for the district court's conclusion that the statute is unconstitutional.

IV

We agree with the district court that if a distiller desires to raise prices in Tennessee, the statute clearly prevents that desire from being gratified unless prices are raised simultaneously wherever the product in question is being sold outside the state. But paraphrasing an observation made by Mr. Justice Stewart in *Seagram*, "[i]t is by no means clear . . . that [Tenn. Code Ann. § 57-3-202(e)] must inevitably produce higher prices in other States . . . rather than the lower prices sought for [Tennessee]," 384 U.S. at 43. It is impossible to tell from the record of this case to what extent Brown-Forman may actually have raised out-of-state prices in order to indulge a desire to raise prices in Tennessee, just as it is impossible to determine to what extent Brown-Forman may actually have refrained from lowering prices outside Tennessee in order to avoid having to lower prices within Tennessee. Nevertheless, if the price elasticity of demand for different types of liquor varies significantly in different parts of the country — and the record suggests that it probably does — we agree that the natural tendency of the Tennessee statute is to impair the efficiency of the interstate liquor market and to deprive consumers of the benefits, if that is the word, of access to the most liquor for the least money.

As noted above, however, such market distortions would not necessarily mean that the statute is unconstitutional, even if the products in question were not covered by the Twenty-first Amendment. See *Exxon Corp. v. Maryland, supra*, 437 U.S. 117. "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within the domain which the Constitution forbids." *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940). And the Tennessee statute has not been shown likely to produce greater distortions in the interstate market than would a statute prohibiting Tennessee liquor sales altogether.

The question before us is not whether Tennessee's liquor-pricing statute is likely to have "repercussions" on liquor prices in other states, but whether Tennessee has actually undertaken to "regulate" liquor prices in other states. See *Brown-Forman*, 476 U.S. at 580, where the Court, speaking through Justice Marshall, said that the inquiry "must center on whether New York's affirmation law *regulates* commerce in other States." (Emphasis supplied.)

In *Brown-Forman*, the distiller argued that the New York statute not only tended to make it more costly to reduce prices in other states, but actually "makes it *illegal* for a distributor to reduce its price in other states during the period that the posted New York price is in effect." *Id.* at 579–80. (Emphasis supplied.) The Supreme Court agreed that this was precisely how the New York statute worked, and the Court held, not surprisingly, that a statute making it illegal to reduce out-of-state prices is a statute that "directly regulates" such prices in violation of the Constitution:

> "Once a distiller has posted prices in New York, it is not free to change its prices elsewhere in the United States during the relevant month.[5] Forcing a merchant

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"[5]The Liquor Authority may 'for good cause shown' permit a distiller to change its prices during a particular month, ABC Law § 101-b(3)(a), and New York speculates that the Authority would permit a distiller to lower its prices in other States in a given month so long as the distiller also lowers them in New York. However, whether to permit such a deviation from the statutory scheme is a matter left by the statute to the discretion of the Liquor Authority.

We would not solve the constitutional problems inherent in New York's statute by indulging the dissent's assumption that the Authority will be sensitive to Commerce Clause concerns. Certainly New York could not require an out-of-state company to receive a license from New York to do business in other States, even if we were quite sure that such licenses would be granted as a matter of course. Similarly, New York simply may not force appellant to seek regulatory approval from New York before it can reduce its prices in another State. The protection afforded by the Commere Clause cannot be made to depend on the good grace of a state agency."

to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce." 476 U.S. at 582.*

The case at bar presents a very different situation from that presented in the Supreme Court's *Brown-Forman* case. Here the distiller is not arguing that the statute in question makes it "illegal" for a distiller to reduce its prices in other states without permission, and there is no conceivable basis on which a court could attribute such an effect to the Tennessee statute. All the distiller can argue here is that the Tennessee statute tends to discourage out-of-state price reductions — because such price reductions must be replicated in Tennessee — just as the statute tends to encourage price increases outside Tennessee, because Tennessee prices cannot be raised without raising foreign prices as well. Price moves as such are not illegal anywhere, as far as Tennessee is concerned, although they may be more costly, from the distiller's standpoint, than they would be in the absence of the statute.

V

The teaching of the Supreme Court's decision in *Seagram*, as we understand it, is that a tendency to increase the distiller's out-of-state costs is simply not enough to convert an otherwise constitutional state liquor law into an impermissible "regulation" of out-of-state liquor prices.

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* In *Brown-Forman Corp. v. South Carolina Alcoholic Beverage Control Commission*, 643 F.Supp. 943 (D. S.C. 1986), the South Carolina district court read the Supreme Court's *Brown-Forman* decision as requiring the invalidation of a South Carolina statute that bore little resemblance to New York's, but was essentially identical to Tennessee's. The district court seems to have interpreted *Brown-Forman* as teaching that where a price affirmation statute has the effect of making out-of-state price cuts costlier to the distiller, the statute is unconstitutional even though it does not make such price cuts illegal, as the New York statute did. We disagree with the district court's interpretation, which seems to deprive the Supreme Court's holding in *Seagram* of all meaning. The district court's decision was not appealed, so we do not know where the Court of Appeals for the Fourth Circuit would have come out on this question.

Seagram dealt with a New York statute that required distillers and other owners of liquor brands to file monthly price schedules accompanied by an affirmation that the price of each item listed on the schedule was "no higher than the lowest price at which such item of liquor was sold by such brand owner . . . to any wholesaler anywhere in any other state . . . at any time during the calendar month immediately preceding the month in which such schedule is filed." Chapter 531, 1964 Session Laws of New York, § 9, as quoted in *Seagram*, 384 U.S. at 350. The New York statute was thus more restrictive than the Tennessee statute. Under the New York statute a distiller could not lower wholesale prices anywhere outside New York without locking itself into a correspondingly low price in New York for all of the next month, while the Tennessee law has no comparable effect. If the New York statute did not constitute "regulation" of out-of-state prices, therefore, it follows *a fortiori* that the Tennessee statute does not constitute such regulation.

The Supreme Court recognized in *Seagram*, just as it did in *Brown-Forman*, "that the most important issue was whether the statute regulated out-of-state transactions." *Brown-Forman*, 476 U.S. 581, referring to *Seagram*, 384 U.S. at 42–43. And the Supreme Court concluded, in *Seagram*, that

> "The mere fact that § 9 is geared to appellants' pricing policies in other States is not sufficient to invalidate the statute. As part of its regulatory scheme for the sale of liquor, *New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country.*" (Emphasis supplied.)

If *Seagram* is still good law, this means that Tennessee "may constitutionally insist that liquor prices to domestic wholesalers . . . be as low as prices offered elsewhere in the country." That, and nothing more than that, is what Tennessee has done in the statute before us.

While the natural tendency of the New York law to increase out-of-state costs would seem to have been just as apparent on its face as is the corresponding tendency of the Tennessee statute, the *Seagram* opinion does mention that the actual effects of the New York statute on the distiller's business outside the state were "largely matters of conjecture." The court noted that it would be time enough to assess the actual effects of the New York law "when a case arises that clearly presents them." 384 U.S. at 43. *Seagram* was not that case, and the court merely held that the statute was not unconstitutional on its face.

The record in the case at bar confirms that the natural tendency of the Tennessee statute is to increase costs outside of Tennessee, but like the record in *Seagram*, it does not quantify the costs involved. Perhaps this is one of the reasons why the district court thought that the issue before it was "whether the [Tennessee] affirmation statute, *on its face*, violates the Commerce Clause of the United States Constitution." (Emphasis supplied.) In holding that the Tennessee statute does, "on its face," violate the Commerce Clause, the district court gave an answer diametrically opposed to the answer given by the Supreme Court in *Seagram*.

VI

It is true, as the Court of Appeals for the Second Circuit recently had occasion to observe, that the Supreme Court's opinion in *Brown-Forman*, and Justice Blackmun's concurrence in that case, have "cast doubt upon the continuing validity of the principles underlying *Seagram*." *In re The Beer Institute*, 849 F.2d 753, 760 (2d Cir. 1988). It is also true, however, that courts of appeals "are not empowered to overrule Supreme Court precedent." *Id.* Only the Supreme Court can do that — and the last time the Supreme Court had an opportunity to overrule *Seagram*, it declined to do so. Because a *Seagram*-like statute was not before the Court in *Brown-Forman*, the *Brown-Forman* court simply said that "we need not consider the continuing validity of *Seagram*." *Brown-Forman*, 476 U.S. 584 n. 6.

On its face, the Tennessee statute seems calculated to affect interstate commerce less drastically than the statute that was upheld in *Seagram*. If the Supreme Court should wish to decide whether *Seagram* is still valid, therefore, this would probably be a good case in which to do it. If not, we assume that lower courts ought to follow *Seagram* in every case to which that decision obviously applies.

The Second Circuit's interpretation of the *Seagram* decision does not necessarily differ from ours. See *United States Brewers Association, Inc. v. Healy*, 692 F.2d 275, 283–84 (2d Cir. 1982), *affirmed without opinion*, 464 U.S. 909 (1983):

> "Given the latitude allowed a state under the Twenty-first Amendment to regulate the sale of liquor within its own borders, the holding in *Seagram* might well validate . . . a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set in the surrounding states, see 384 U.S. at 43–45, 86 S.Ct. at 1260–1261, leaving those out-of-state prices unregulated by Connecticut. But nothing in *Seagram* purports to rule that a state may achieve its goal of price-parity by the far more drastic, and clearly excessive, method of controlling the minimum prices at which liquor may be sold outside of its own territory."

The Connecticut statute that was held unconstitutional in *Healy* told a brewer "that for any given month when it sells beer to a wholesaler in Massachusetts, in New York, or in Rhode Island, it may not do so at a price lower than that it has previously announced it will charge to Connecticut wholesalers." *Id.* at 282. The Tennessee statute, in contrast, exercises no control over out-of-state prices; it simply requires that a distiller set its Tennessee prices at the lowest levels it chooses to set in other states. That requirement, as the Second Circuit acknowledged, "may well" be validated by the holding in *Seagram*.

The Connecticut statute considered by the Second Circuit in *Beer Institute* was an amended version of the one invalidated in *Healy*. The Connecticut legislature had attempted to fix the statute up along the lines laid out in *Healy*, but the court thought the job had been bungled. *Beer Institute*, 849 F.2d at 755–56. Read in conjunction with the liquor laws of the surrounding states, the Connecticut statute still exercised control, "inevitably," over out-of-state prices. *Id.* at 758. The *Beer Institute* court declined "to *extend* the *Seagram* precedent to validate a simultaneous affirmation provision that, by its purposeful interaction with border-state regulatory schemes, operates to control prices beyond Connecticut's borders." *Id.* at 760–61.

VII

In the case at bar there has been no claim that the Tennessee affirmation statute was designed to interact with the statutes of other states in such a way as inevitably to control prices beyond Tennessee's borders. What Brown-Forman told the Tennessee Alcoholic Beverage Commission, indeed, was that the *Brown-Forman* decision made "the affirmation law[s] of *all* states" unconstitutional.

If the interaction of Tennessee's law with the laws of the other states should somehow create an extraterritoriality problem, moreover, the fault would not necessarily be Tennessee's, as opposed to being the fault of the other states. In other contexts, the Supreme Court has resolved such questions by resort to an "internal consistency" test reminiscent of Kant's categorical imperative; what would the effect be, the Court asks, if the statute under consideration were adopted in identical form by all states? See *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983). If the results of such universal adoption would be unacceptable, the statute may not pass constitutional muster.

Tennessee statute would pass the "internal consistency" test without difficulty. If every state adopted a liquor pricing

statute identical to Tennessee's, market forces might, to be sure, be distorted enough to make Adam Smith turn in his grave. But "[t]he Constitution does not require the States to subscribe to any particular economic theory." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. ____, ____, 95 L.Ed.2d 67, 87 (1987), and with universal adoption of laws such as Tennessee's, no state would be forbidding any distiller to reduce its prices in any foreign state. Perhaps an out-of-state price cut would cost the distiller more than it would in a free market, but, under uniform affirmation laws identical to Tennessee's, no such price cut would be illegal.

VIII

The plaintiffs in *Beer Institute* raised an "economic protectionism" issue that the Second Circuit found it unnecessary to reach in view of its holding that the Connecticut statute "inevitably exercise[d] control" over out-of-state prices and thus constituted a direct regulation of interstate commerce. 849 F.2d at 757–58. Brown-Forman contends here, as it contended in its challenge to the New York statute, that a law which disadvantages consumers in other states represents "the sort of 'simple economic protectionism' that [the Supreme Court] has routinely forbidden." *Brown-Forman*, 476 U.S. at 580, quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Where the Twenty-first Amendment is concerned, however, the short answer to this argument would seem to be that *Seagram* expressly rejected it: "As part of its regulatory scheme for the sale of liquor, [a state] *may* constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country." *Seagram*, 384 U.S. at 43. (Emphasis supplied.) There has been no showing here that the Tennessee statute "disadvantages" out-of-state consumers any more than the statute upheld by the Supreme Court in *Seagram* did. As a Tennessee distiller, moreover (see note 6, *infra*), Brown-Forman can hardly contend that the statute is unconstitutional because it treats local distillers more favorably than foreign distillers. *Cf. Bacchus Imports Limited v. Dias*, 468 U.S. 263 (1984).

IX

We note, finally, that in the post-*Brown-Forman* case of *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. ____, 95 L.Ed.2d 67 (1987), the Supreme Court declared that "[t]he principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce." 481 U.S. at ____, 95 L.Ed.2d at 84. In this connection the Supreme Court referred with evident approval to Professor Regan's article at 84 Mich. L. Rev. 1091 (1986) on "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause." *Id.*

Seagram teaches that statutes comparable to Tennessee's do not, on their face, "discriminate" against interstate commerce,[6] and Professor Regan — who has said that he is "inclined to think the Court was right" in *Brown-Forman* — also thinks that the type of retrospective affirmation laws upheld in *Seagram* "do not violate the extraterritoriality principle." Regan, "Siamese Essays," 85 Mich. L. Rev. at 1903, 1905.

Neither, we presume, would Professor Regan consider such statutes impermissibly "protectionist." See 84 Mich. L. Rev. at 1244, where, in discussing Justice Marshall's opinion in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), Regan suggests that the Montana statute at issue in *Commonwealth Edison* does not even have a protectionist effect, much less a protectionist purpose, because "[n]o local economic factor is favored, even in the effects of the statute, vis-

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[6] See also *Exxon Corp. v. Maryland*, 437 U.S. at 125-26. Just as in-state gasoline dealers had no competitive advantage over out-of-state dealers under the Maryland statute that was upheld in *Exxon*, in-state distillers have no competitive advantage over out-of-state distillers under Tennessee's affirmation statute. And, as Brown-Forman's complaint in this case discloses, Brown-Forman happens to *be* an in-state distiller. Brown-Forman is a Tennessee corporation, and readers of the company's magazine advertising may recall that Brown-Forman's Jack Daniel distillery is located in Lynchburg, Tennessee.

a-vis any foreign competitor." Precisely the same thing can be said of Tennessee's affirmation statute — and if Professor Regan is a reliable guide, there is no reason why the author of *Brown-Forman* should have any difficulty in reconciling the opinion in that case with Justice Stewart's opinion in *Seagram*.

If what the Supreme Court is doing, in its dormant Commerce Clause cases, is "preventing state protectionism, where protectionism is defined in terms of purposeful favoring of locals over their foreign competitors," 84 Mich. L. Rev. at 1206 (emphasis omitted), then the Tennessee statute is not endangered, for it is no more a "protectionist" or "discriminatory" statute than it is an extraterritorial one. We need not decide, of course, whether Tennessee's affirmation law could properly serve as a model for legislation aimed at products not covered by the Twenty-first Amendment. Brown-Forman's products *are* subject to the Twenty-first Amendment, and reading *Seagram* and *Brown-Forman* together, we do not see why in-state sales of those products may not be regulated in the way Tennessee has chosen to regulate them.

We are not concerned with the wisdom of Tennessee's law, obviously, but only with its constitutionality. "[A] law can be both economic folly and constitutional." *CTS Corp.*, 95 L.Ed.2d at 90 (Scalia, J., concurring). A law duly enacted by a state legislature, with the assent of a state governor or over his veto, ought not to be set aside by an unelected federal judiciary unless the Constitution compels that drastic step.

We think the district court erred as a matter of law in its holding that the Tennessee statute is unconstitutional. The judgment of the district court is REVERSED, and the case is REMANDED with instructions to dissolve the injunction and dismiss the complaint.

Supreme Court, U.S.
FILED
DEC 29 1988
JOSEPH F. SPANIOL, JR.

Nos. 88-449, 88-513

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

JOHN F. HEALY, et al.,
Appellants,
v.
THE BEER INSTITUTE, et al.,
Appellees.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.,
Intervenor-Appellants,
v.
THE BEER INSTITUTE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

JOSEPH I. LIEBERMAN
Attorney General
ROBERT F. VACCHELLI*
RICHARD M. SHERIDAN
Assistant Attorneys General
MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
Telephone: (203) 566-7570
Attorneys for Appellants John F. Healy, David L. Snyder and Charles Kasmer
*Counsel of Record

(List of Counsel continued on inside front cover.)

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PROBABLE JURISDICTION NOTED NOVEMBER 14, 1988

JEFFREY I. GLEKEL*
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
919 Third Avenue
New York, N.Y. 10022
Telephone: (212) 735-3000
Attorney for Appellee
Anheuser-Busch, Inc.

Of Counsel:
Timothy G. Reynolds
Gary B. Friedman

JEROME I. CHAPMAN*
ARNOLD & PORTER
1200 New Hampshire
Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 872-6700
Attorney for Appellee
Miller Brewing Company

Of Counsel:
Wayne C. Holcombe

WILLIAM H. ALLEN*
COVINGTON & BURLING
1201 Pennsylvania, N.W.
Washington, D.C. 20044
Telephone: (202) 662-6000
Attorney for Appellees
The Beer Institute,
G. Heilman Brewing Company,
The Genessee Brewing
Company, Inc.,
All Brand Importers, Inc.,
Dribeck Importers, Inc.,
Guiness-Harp Corp.,
Labatt Importers Inc.,
Martlett Importing
Company, Inc.,
Monterey Bay Company,
Inc., and
Van Munching and Company, Inc.

GARY NATEMAN, ESQ.
THE BEER INSTITUTE
1225 Eye Street, N.W.
Washington, D.C. 20005
Telephone: (202) 737-2337
Attorney for Appellee
The Beer Institute

WILLIAM A. WECHSLER*
ALFRED F. WECHSLER
GREGORY J. SOUTHWORTH
BAILEY AND WECHSLER
66 Forest Street
Hartford, CT 06105
Telephone: (203) 525-9191
Attorneys for
Intervenor-Appellants
Wine and Spirits Wholesalers
of Connecticut, Inc.,
Johnny Barton, Inc.,
The Brescome Distributor Corp.,
Connecticut Distributors, Inc.,
Eder Bros., Inc.,
Gallo Wine Merchants, Inc.,
Allan S. Goodman, Inc., and
Hartley and Parker Limited, Inc.

*Counsel of Record

Nos. 88-449, 88-513

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

JOHN F. HEALY, et al.,
Appellants,
v.
THE BEER INSTITUTE, et al.,
Appellees.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.,
Intervenor-Appellants,
v.
THE BEER INSTITUTE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

July 25, 1984 — Complaint for Declaratory Judgment and Injunctive Relief filed in the United States District Court, District of Connecticut (Hartford) by Appellees The Beer Institute (formerly the United States Brewers Ass'n) et al. ("Brewers")

August 30, 1984 — Answer, Motion for Summary Judgment, Statement of Material Facts Not in Dispute, Affidavit and Brief filed by Appellants John F. Healy, et al. ("Connecticut")

September 19, 1984 — Answer, Motion to Intervene filed by Intervenor-Appellants Wine and Spirits Wholesalers of Connecticut, Inc. ("Wholesalers")

October 16, 1984 — Wholesalers' Motion to Intervene granted.

November 30, 1984 — Notice of Brewers' First Set of Interrogatories filed.

January 10, 1985 — Connecticut's Answer to Interrogatories filed.

January 17, 1985 — Wholesalers' Answer to Interrogatories filed.

February 13, 1985 — Wholesalers' Brief in Support of Connecticut's Motion for Summary Judgment filed.

February 13-14, 1985 — Brewers' Cross-Motion for Partial Summary Judgment, Statement of Material Facts and Brief filed.

March 6, 1985 — Connecticut's Response to Brewers' Statement of Facts and Reply Brief filed.

March 26, 1985 — Brewers' Reply Brief filed.

June 23, 1986 — Brewers' Supplemental Brief filed.

June 27, 1986 — Connecticut's Supplemental Brief filed.

July 30, 1986 — Wholesalers' Supplemental Brief filed.

September 11, 1987 — Ruling on Cross-Motions for Summary Judgment filed by the District Court.

September 15, 1987 — Judgment for Connecticut filed by the District Court.

October 13, 1987 — Notice of Appeal to the United States Court of Appeals for the Second Circuit filed by Brewers.

December 1, 1987 — Record on Appeal filed.

December 9, 1987 — Brewers' Brief on appeal and Joint Appendix filed.

December 31, 1987 — Connecticut's Brief on appeal filed.

January 6, 1988 — Wholesalers' Brief on appeal filed.

January 19, 1988 — Brewers' Reply Brief filed.

June 13, 1988 — Judgment and Published Opinion of the Court of Appeals filed reversing decision of the District Court.

June 29, 1988 — Notice of Appeal to the Supreme Court of the United States filed by Connecticut.

July 7, 1988 — Notice of Appeal to the Supreme Court of the United States filed by Wholesalers.

September 8, 1988 — Mandate of the Court of Appeals issued.

September 12, 1988 — Jurisdictional Statements filed by Connecticut and Wholesalers in the Supreme Court of the United States.

September 20, 1988 — Judgment on remand pursuant to mandate entered by the District Court.

October 14, 1988 — Motion for Summary Affirmance filed by Brewers in the Supreme Court of the United States.

November 8, 1988 — Supplemental Brief filed by Connecticut.

November 9, 1988 — Supplemental Brief filed by Wholesalers.

November 14, 1988 — Probable Jurisdiction Noted and appeals consolidated by the Supreme Court of the United States.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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UNITED STATES BREWERS ASSOCIATION, INC., as an association, and on behalf of its following members selling beer in the State of Connecticut and the bordering States of Massachusetts, New York and Rhode Island:

ANHEUSER-BUSCH, INC., CHAMPALE, INC., CHRISTIAN SCHMIDT BREWING COMPANY, LATROBE BREWING COMPANY, PABST BREWING COMPANY, THE STROH BREWERY COMPANY;

ANHEUSER-BUSCH INC.; G. HEILEMAN BREWING COMPANY; THE GENESEE BREWING COMPANY, INC.; MILLER BREWING COMPANY; ALL BRAND IMPORTERS, INC.; DRIBECK IMPORTERS, INC.; GUINESS-HARP CORP.; LABATT IMPORTERS, INC.; MARTLETT IMPORTING COMPANY, INC.; MONTEREY BAY COMPANY, INC.; and VAN MUNCHING COMPANY, INC.,

Plaintiffs,

— against —

JOHN F. HEALY and DAVID L. SNYDER, as Commissioners of the Department of Liquor Control; and CHARLES KASMER, as Secretary of the Department of Liquor Control,

Defendants.

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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs for their complaint in this action allege as follows:

Nature of This Action

1. This is an action for a declaratory judgment that the beer price affirmation provisions of Connecticut Pub. Act 84-332, Pub. Act 84-432 and Section 30-63a(b) of the Connecticut Liquor Control Act are unconstitutional, and for an injunction prohibiting defendants from enforcing those provisions.

2. The declared purpose of Pub. Act 84-332 is to conform to the decision of the United States Supreme Court in *United States Brewers Association, Inc. v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff'd*, 104 S. Ct. 265 (1983) ("*Healy*"), which invalidated a 1981 Connecticut beer price affirmation scheme as violative of the Commerce Clause of the United States Constitution. The revised legislation, however, fails to achieve its stated objective. Pub. Act 84-332, in conjunction with Pub. Act 84-432 and Section 30-63a(b) of the Connecticut Liquor Control Act (which was not amended or repealed by the Legislature), requires all brewers and importers of beer to sell their products to Connecticut wholesalers at a price that is fixed prior to the beginning of each month and thereafter may not be changed throughout the month, and mandates that that fixed sale price may be no "higher than the lowest price at which such item of beer is then being sold . . . to any wholesaler . . . in any state bordering [Connecticut]." Thus, the new affirmation scheme effectively regulates future prices in New York, Massachusetts and Rhode Island (the "Border States") in the very same manner as was invalidated in *Healy*.

3. The beer price affirmation provisions also are a classic example of protectionist legislation designed to insulate Connecticut beer wholesalers and retailers from vigorous existing competition with wholesalers and retailers in the Border States. Connecticut has made it a criminal violation for a brewer or importer which is selling its products in Connecticut

to offer those products to any wholesaler in the Border States at a price lower than the price offered in Connecticut, without any regard to competitive conditions in the Border States. Enforcement of these provisions, unless enjoined by this Court, inevitably will have the intended effect of eliminating interstate and regional competition in beer sales to the detriment of the plaintiffs and constitute an undue burden on interstate and foreign commerce in violation of the Commerce Clause of the Constitution of the United States.

4. The beer price affirmation provisions place severe burdens upon the ability of brewers, importers and wholesalers and retailers in the Border States to engage in interstate commerce which violate the Commerce Clause of the Constitution of the United States.

5. The beer price affirmation provisions additionally violate the Supremacy Clause of the United States Constitution by requiring conduct more fully described below which, if engaged in by any group of brewers and importers otherwise than under mandate of law, would violate Section 1 of the Sherman Act, 15 U.S.C. § 1.

Jurisdiction and Venue

6. This Court has subject matter jurisdiction over this action pursuant to:

(a) 28 U.S.C. § 1331(a), because the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution and laws of the United States; and

(b) 28 U.S.C. § 1337, because this action arises under acts of Congress regulating commerce and protecting trade and commerce against restraints and monopolies.

7. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b) because the claim arises and defendants reside in this district.

The Parties

8. Plaintiff United States Brewers Association, Inc. ("USBA") is a non-profit corporation organized and existing under the laws of the State of New York, with its principal place of business in Washington, D.C., of which 39 companies that brew beer in the United States are members and 23 companies that import and sell in the United States beer brewed outside the United States are affiliated members. Domestic brewer members of the USBA that do business in Connecticut and one or more of the states bordering Connecticut, on whose behalf USBA sues are:

(a) Anheuser-Busch, a corporation organized and existing under the laws of the State of Missouri, with its principal place of business in Missouri;

(b) Champale, Inc., a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business in New Jersey;

(c) Christian Schmidt Brewing Company, a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Pennsylvania;

(d) Latrobe Brewing Company, a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Pennsylvania;

(e) Pabst Brewing Company, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Wisconsin;

(f) The Stroh Brewery Company, a corporation organized and existing under the laws of the State of Arizona with its principal place of business in Michigan.

9. Plaintiff Anheuser-Busch, Inc. is described in paragraph 8(a) above.

10. Plaintiff The Genesee Brewing Company, Inc. is a corporation organized and existing under the laws of the State of New York with its principal place of business in New York.

11. Plaintiff G. Heileman Brewing Company, Inc. is a corporation organized and existing under the laws of the State of Wisconsin, with its principal place of business in Wisconsin.

12. Plaintiff Miller Brewing Company is a corporation organized and existing under the laws of the State of Wisconsin, with its principal place of business in Wisconsin.

13. Plaintiff All Brand Importers, Inc. is a corporation organized and existing under the laws of the State of New York, with its principal place of business in New York.

14. Plaintiff Dribeck Importers, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Connecticut.

15. Plaintiff Guiness-Harp Corporation is a corporation organized and existing under the laws of the State of New York, with its principal place of business in New York.

16. Plaintiff Labatt Importers, Inc. is a corporation organized and existing under the laws of the State of New York, with its principal place of business in New York.

17. Plaintiff Martlett Importing Company, Inc. is a corporation organized and existing under the laws of the State of New York, with its principal place of business in New York.

18. Plaitiff Monterey Bay Company, Inc. is a corporation organized and existing under the laws of the State of California with its principal place of business in New York.

19. Plaintiff Van Munching Company, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York.

20. None of the members of plaintiff USBA named in paragraph 8 owns or operates a brewery in Connecticut. None of the plaintiff brewers or importers named in paragraphs 9 through 19 owns or operates a brewery in Connecticut.

21. On information and belief, defendant John F. Healy is a resident and citizen of Connecticut. In his official capacity as a Commissioner and Chairman of the Department of Liquor Control he is charged with responsibility for enforcing the beer price affirmation provisions.

22. On information and belief, defendant David L. Snyder is a resident and citizen of Connecticut. In his official capacity as Commissioner of the Department of Liquor Control, he is charged with responsibility for enforcing the beer price affirmation provisions.

23. On information and belief, defendant Charles Kasmer is a citizen and resident of Connecticut. In his official capacity as the Secretary of the Department of Liquor Control he administers many of the day-to-day affairs of the Department including, on information and belief, enforcement of the beer price affirmation provisions.

The Beer Industry in Connecticut And The Border States

24. There are essentially three tiers of distribution for beer in Connecticut and the Border States: (i) the brewers and importers; (ii) the wholesalers; and (iii) the retail outlets.

25. The brewers and importers of beer generally market their brands in one of two loosely defined categories: national brands such as Budweiser or Miller High Life, which are marketed and promoted nationwide, and regional or local brands such as Genesee Cream Ale and Piels, which are generally promoted within limited geographic regions of the country. There are no breweries within the State of Connecticut and all beer, whether national or regional, is shipped into

Connecticut by brewers and importers from out of state, which are designated as out-of-state shippers under Connecticut law. Unless otherwise indicated, the term "out-of state shippers" refers to all brewers and importers including all plaintiffs herein, other than the USBA.

26. The prices charged and package configurations offered by out-of-state shippers to wholesalers in Connecticut, New York, Massachusetts and Rhode Island vary from market to market within that four state area. In certain markets, regional brewers or importers price their beers at levels that allow their wholesalers to create the lowest consumer prices possible in the geographic areas in which their products are sold. As a result, other brewers or importers electing to compete in those areas have to consider this competitive pricing when making their own price decisions. Other factors which have an impact on pricing and marketing decisions, such as consumer tastes, packaging costs and freight, also vary from area to area even within these states. Thus, a variable pricing and marketing structure has emerged which results in substantial interstate competition in retail beer sales.

27. In Connecticut there is typically more than one wholesaler for an out-of-state shipper's products. Each wholesaler generally handles products from more than one competing out-of-state shipper but is restricted, by Connecticut law, from selling to retailers outside its geographical territory both within and outside of Connecticut.

28. The primary off-premise retail outlets for beer in Connecticut are package stores and grocery stores. Retailers, particularly those near the Connecticut border, face substantial competition from retail beer outlets in the Border States. Many Connecticut residents historically have traveled to New York, Massachusetts or Rhode Island to purchase beer. The Connecticut Legislature's motivation in enacting the original beer price affirmation provisions was a desire to halt this interstate competition by discouraging, through lower

Connecticut prices, out-of-state purchases of beer by Connecticut residents. The recent amendments to those provisions contained in Pub. Act 84-332 were considered by the Legislature as mere technical amendments to the law in an attempt to comply with *Healy* and thus the purpose of the beer price affirmation provisions remains the same.

The Original Beer Price Affirmation Scheme And Healy

29. In 1981, Connecticut for the first time enacted a statute designed to impose price affirmation upon out-of-state shippers of beer. The beer price affirmation scheme, however, was invalidated by the United States Court of Appeals for the Second Circuit in *Healy*, 692 F.2d 275 (2d Cir. 1982), which was affirmed by the United States Supreme Court, 104 S. Ct. 265 (1983).

30. Under the original law, an out-of-state shipper was required, on a monthly basis, to post the prices it would charge to Connecticut wholesalers during the following month. The posted prices were "controlling" or fixed prices and could not be changed by the out-of-state shipper during the posted period.

31. Along with the posting, the out-of-state shipper was required to affirm under oath that the posted prices would be no higher than the lowest prices it would charge in the Border States during the next month. Furthermore, under Section 30-63a(b), an out-of-state shipper was prohibited from selling its product to a Connecticut wholesaler at a price which was higher than the lowest price then being charged to any wholesaler in a Border State.

32. In *Healy*, the USBA and certain other plaintiffs named herein challenged the former Connecticut law, *inter alia*, as being violative of the Commerce Clause of the Constitution of the United States. The Second Circuit held that because the affirmation scheme not only set future maximum prices in Connecticut each month but also necessarily

established the future minimum prices for each particular product in the Border States, it impermissibly restricted the freedom of the out-of-state shipper to change its prices in the Border States. Since, as the Court noted, the state of Connecticut had no legitimate interest in regulating out-of-state prices, the Court declared that the entire legislative scheme constituted a violation of the Commerce Clause and was unconstitutional. The United States Supreme Court affirmed.

The Beer Price Affirmation Provisions of Public Acts 332 and 432

33. Pub. Acts 84-332 and 84-432 were passed by the Connecticut Senate on April 18 and May 7, 1984 and by the House of Representatives on May 3 and 9, 1984, respectively. Pub. Act 84-432 was signed by Governor O'Neill on June 13, 1984 and Pub. Act 84-332 was signed by Governor O'Neill on June 14, 1984. A copy of Pub. Act 84-332 is annexed hereto as Exhibit A, and a copy of Pub. Act 84-432 is annexed hereto as Exhibit B. The Acts, in combination with existing law which has not been repealed or amended, impose direct restrictions on the future prices which out-of-state shippers can charge to Border State wholesalers.

34. Section 1 of Pub. Act 84-332, which amends Section 30-63 of the Liquor Control Act, requires, like the original law, each out-of-state shipper to post, on a monthly basis, the bottle, can, case, keg and barrel price of any brand of goods it offers in Connecticut. Those posted prices, "when so posted shall be the controlling price[s] for such . . . out-of-state permittee for the month following such posting."

35. In conjunction with the posting, section 3 of Pub. Act 332, which amends Section 30-63b(b) of the Liquor Control Act, requires that an out-of-state shipper must "file with the department of liquor control a written affirmation under oath . . . certifying that at the time of posting the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees is no higher than the lowest

price at which each such item of beer is sold, offered for sale, shipped, transported or delivered by such . . . out-of-state shipper to any wholesaler in any state bordering this state."

36. Section 30-63a(b) of the Liquor Control Act, which was not amended, and remains in full force and effect, provides that:

> "no holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer as defined in section 30-1, at a bottle, can or case price, or price per keg, barrel or fractional unit thereof, *higher than the lowest price at which such item is then being sold* or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper *to any wholesaler in any state bordering this state*." (emphasis added)

37. Although Section 3(c) of Pub. Act 84-332, which creates a new Section 30-63(e) of the Liquor Control Act, declares that the affirmation requirement does not prohibit an out-of-state shipper from changing prices in the Border States, the interaction of the posting and affirmation provisions of Pub. Act 84-332 with Section 30-63a(b) of the Liquor Control Act not only limits the price at which out-of-state shippers may sell to Connecticut wholesalers, but also sets the lowest price which an out-of-state shipper may charge anywhere in the Border States during the succeeding month. Thus, as under the original price affirmation scheme, an out-of-state shipper is not free to lower any Border State price below the previously affirmed Connecticut price.

38. Section 4 of Pub. Act 84-332, which amends Section 30-63c(b) of the Liquor Control Act, requires that in determining the lowest price at the time of posting as to which affirmation must be made "appropriate reductions" will be made for all "discounts, rebates, free goods, allowances and other

inducements of any kind whatsoever, including depletion and floor-stock allowances." The only differentials in price permitted are those relating to differences in state taxes and fees and the "actual cost" of delivery. No consideration of variations in competitive conditions is permitted.

39. Pub. Act 84-432, which was passed after Pub. Act 84-332, appears to amend Section 30-63c(b) to require that the "lowest price" in the Border States, as previously described in paragraph 38, be determined with respect to prices offered in the Border States not at the time of posting but rather, during the period covered by the posting — the succeeding month.

40. Finally, the beer price affirmation provisions not only mandate the price at which beer must be sold in Connecticut and below which it cannot be sold in the Border States, but Section 30-63c(b), as further amended by Pub. Act 84-432, also requires that each out-of-state shipper of beer "shall offer to Connecticut wholesalers all of the sizes and packages approved by the Department of Liquor Control, of his brand which he offers to any wholesaler in any state bordering this state."

The Effect of the Beer Price Affirmation Provisions on Interstate Commerce

41. The most immediate effect of the newly renovated beer price affirmation provisions is to regulate or fix future minimum prices for beer in the Border States. This extraterritorial regulation results from the continuation of the requirements that (a) an out-of-state shipper must post in advance and thereby fix its future prices in Connecticut for each month and (b) an out-of-state shipper thereafter may not sell its products during that succeeding month in Connecticut at a price higher than the lowest price then being charged in a Border State.

42. Furthermore, the beer price affirmation provisions will make it much more difficult for beer wholesalers and

retailers in the Border States to compete in interstate commerce with Connecticut wholesalers and retailers for sales to Connecticut consumers. The new law mandates that whatever the price charged to Connecticut wholesalers, the price charged in the Border States must be equal or higher, never lower. Accordingly, the statute, on its face, poses a virtually insurmountable restraint on the ability of Border State wholesalers and retailers to compete effectively with Connecticut wholesalers and retailers.

43. The statute also imposes very serious burdens on the ability of out-of-state shippers who offer their products in Connecticut to price and market their products in the Border States, including, among others, the following restrictions:

(a) The requirement that the price posted by an out-of-state shipper and offered to all Connecticut wholesalers must not exceed the lowest price offered by it anywhere in any Border State will severely burden and inhibit the pricing decisions made by out-of-state shippers. Out-of-state shippers cannot offer future short term price promotions in limited geographical areas within the Border States or future lower prices to meet localized competition (such as competition from regional breweries), if such promotions or price reductions would result in the lowest price in the Border States, unless that lowered price is also offered throughout Connecticut for the next full month.

(b) The requirement that all sizes and packages of a product offered in any Border State must be offered throughout Connecticut also imposes severe burdens on the economic conduct of brewers outside the State of Connecticut. This provision makes it virtually impossible to conduct test marketing in the states of Rhode Island, Massachusetts and New York, which historically contain some of the most popular test markets in the Northeast, since any new product package or size test marketed in those states would have to be offered throughout the State of Connecticut, thereby defeating the purpose of a limited "test" market. Additionally, in order to

comply with the arbitrary "all sizes and packages" requirement, the out-of-state shippers would be required to incur substantial expense in supplying all of their packages and sizes in Connecticut.

Count I

[Violation of the Commerce Clause]

44. Plaintiffs repeat and reallege each of the preceding paragraphs as if fully set forth herein.

45. The beer price affirmation provisions, by tying the out-of-state shippers' future prices in Connecticut to their future prices in the Border States, regulate or fix the minimum prices they may charge in the Border States and thereby prohibit out-of-state conduct in violation of the Commerce Clause of the United States Constitution, Article I, Section 8, cl. 3.

46. Plaintiffs have no adequate remedy at law.

Count II

[Violation of the Commerce Clause]

47. Plaintiffs repeat and reallege each of the preceding paragraphs as if fully set forth herein.

48. The beer price affirmation provisions were enacted by the Connecticut legislature for the purpose, and will have the intended effect, of protecting and insulating Connecticut retail and wholesale sellers of beer against competition from retail and wholesale sellers of beer in the Border States, thereby creating an unconstitutional burden on interstate commerce, and violating the Commerce Clause of the United States Constitution, Article I, Section 8, cl. 3, and 42 U.S.C. § 1983.

49. Plaintiffs have no adequate remedy at law.

Count III

[Violation of the Commerce Clause]

50. Plaintiffs repeat and reallege each of the preceding paragraphs as if fully set forth herein.

51. Enforcement of the beer price affirmation provisions will (i) eliminate the ability of out-of-state shippers to sell beer to Border State wholesalers at prices and in packages required by competitive market conditions; (ii) restrict the ability of out-of-state shippers to conduct test marketing or promotional campaigns in the Border States; (iii) cause out-of-state shippers to incur substantial unjustified expenses to comply with the law's "all sizes and packages" requirements; (iv) restrict the ability of out-of-state shippers, wholesalers and retailers to compete in interstate commerce; and (v) impose other substantial burdens and restraints on interstate commerce, all in violation of the Commerce Clause of the United States Constitution, Art. I, Section 8, cl. 3.

52. Plaintiffs have no adequate remedy at law.

Count IV

[Violation of the Supremacy Clause]

53. Connecticut's beer price affirmation provisions, in conjunction with Connecticut's price posting requirements, require that all out-of-state shippers doing business in Connecticut and in one or more of the Border States must establish prices below which they will not sell beer to wholesalers in any Border State where they do business, which prices must be equal to or higher than the Connecticut posted price for each item of beer, and require further that the out-of-state shippers must maintain those minimum sale prices for the calendar-month-long periods mandated by the Connecticut price posting requirements.

54. There are certain local markets for beer that encompass parts of Connecticut and parts of one or more of the Border States. In each of these markets straddling the Connecticut border, Connecticut wholesalers are in competition with wholesalers in a Border State. Connecticut's beer price affirmation provisions prevent out-of-state shippers doing business in Connecticut and in one or more of the Border States from dealing with the wholesalers in a Border State who are in competition with Connecticut wholesalers on terms that are more favorable than the terms offered to the competitor Connecticut wholesaler, irrespective of competitive conditions.

55. Massachusetts' price law requires out-of-state shippers to post before the first day of the month the prices to be charged to Massachusetts wholesalers effective on the first day of the subsequent month. Those Massachusetts posted prices are, by law, publicly available information. Connecticut's price posting laws require out-of-state shippers on a monthly basis to post the prices to be charged to wholesalers effective on the first day of the subsequent month. Connecticut's beer price affirmation provisions therefore require that out-of-state shippers post in Massachusetts before the first day of the month prices that, under Connecticut law, may not be exceeded by the prices that will be posted in Connecticut later that month. Thus, the effect of the beer price affirmation provisions is to require brewers and importers doing business in both Massachusetts and Connecticut to make publicly available their future maximum prices for Connecticut.

56. The conduct required of all out-of-state shippers doing business in Connecticut and in one or more of the Border States as described in paragraphs 53–55 — i.e., the establishment and maintenance of minimum prices for each item of beer in a four-state area, the obligation not to deal with certain of their customers except on the same terms or more favorable terms as they deal with other customers, and the posting and public availability in one state of maximum future prices to be charged elsewhere — would, if engaged in by any such

group of out-of-state shippers otherwise than under mandate of law, violate Section 1 of the Sherman Act, 15 U.S.C. § 1. Therefore, the beer price affirmation provisions contravene the Supremacy Clause of the United States Constitution, Act. IV, cl. 2.

COMPLIANCE WITH THE BEER PRICE AFFIRMATION PROVISIONS WILL IRREPARABLY INJURE PLAINTIFFS

57. Compliance with the beer affirmation provisions will immediately and irreparably injure plaintiffs in that it will severely disrupt, inhibit and injure their ability to make pricing and marketing decisions in response to competitive conditions in the Border States, disrupt their relationships with wholesalers, retailers and consumers in Connecticut and the Border States, unduly burden the conduct of their business and cause plaintiffs to suffer substantial damages in an amount not reasonably susceptible of being calculated.

WHEREFORE, plaintiffs, having no adequate remedy at law, respectfully request that this Court:

(a) declare and adjudge that the beer price affirmation provisions unduly burden interstate commerce in violation of the Commerce Clause of the United States Constitution and thus are null and void;

(b) declare and adjudge that the beer price affirmation provisions, being in conflict with the provisions of the Sherman Act, are in violation of the Supremacy Clause of the United States Constitution and thus are null and void;

(c) temporarily restrain, preliminarily enjoin and permanently enjoin the defendants, their successors in office, their agents, servants, employees and attorneys as well as all persons in active concert or participation with them from taking any action whatsoever to enforce or apply the beer price affirmation provisions and any orders, rules or regulations issued pursuant thereto, against plaintiffs in connection with their sales of beer in Connecticut or any other state; and

(d) grant such other and further relief as the Court shall deem just and proper.

Dated: Hartford, Connecticut
July , 1984

DAY, BERRY & HOWARD

By _____
(A Member of the Firm)
City Place
Hartford, Connecticut 0613-3499
(203) 275-0100
Attorneys for Plaintiffs

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

By /s/ [signature illegible]
(A Member of the Firm)
919 Third Avenue
New York, New York 10022
Attorneys for Plaintiff
Anheuser-Busch, Inc.

ARNOLD & PORTER

By /s/ [signature illegible]
(A Member of the Firm)
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Attorneys for Plaintiff
Miller Brewing Co.

COVINGTON & BURLING

By /s/ William H. Alle
(A Member of the Firm)
1201 Pennsylvania, N.W.
Washington, D.C. 20044
Attorneys for Plaintiffs
United States Brewers Association, Inc.,
G. Heilman Brewing Company,
The Genesee Brewing Company, Inc.,
All Brand Importers, Inc.,
Dribeck Importers, Inc.,
Guiness-Harp Corp.,
Labatt Importers, Inc.,
Martlett Importing Company, Inc. and
Monterey Bay Company, Inc.; and
Van Munching Company, Inc.

GARY NATEMAN, ESQ.

/s/ Gary Nateman
United States Brewers Association, Inc.
1750 K. Street N.W.
Washington, D.C. 20006
Attorneys for Plaintiff
United States Brewers Association, Inc.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

NO. H84 816 PCD

AUGUST 30, 1984

ANSWER

FIRST DEFENSE

Count I

1. The Defendants admit the allegations in paragraphs 1, 8-24, and 29-31.

2. The Defendants deny the allegations in paragraphs 3-7, 39, 41-43, 45 and 46.

3. As to paragraph 2, the Defendants admit the first sentence. The rest and remainder of the paragraph is denied.

4. As to the allegations in the first sentence of paragraph 25, the Defendants do not have sufficient knowledge upon which to form a belief and leave Plaintiffs to the proof thereof. The rest and remainder of the paragraph is admitted.

5. As to paragraph 26, the Defendants do not have sufficient knowledge upon which to form a belief and leave Plaintiffs to the proof thereof.

6. As to paragraph 27, the Defendants admit the allegations with respect to beer, but note that any geographic territorial limits within Connecticut imposed on Connecticut wholesalers are established at the choice of the appointing out-of-state shipper pursuant to C.G.S. Sec. 30-63(a) and Sec. 30-6-B7 of the Regulations of Connecticut state agencies.

7. As to paragraph 28, the first three sentences are admitted. The rest and remainder of the paragraph is denied.

8. Paragraph 32 is denied inasmuch as it is argumentative and interprets court decisions which speak more accurately for themselves.

9. As to paragraph 33, the last sentence is denied. The rest and remainder of the paragraph is admitted.

10. As to paragraph 34, the Defendants, essentially, admit the paragraph except to note that Public Act 84-332 added new language that prices be posted "on a monthly basis" and to note that the law does not employ the term "goods".

11. As to paragraph 35, the Defendants essentially admit the allegation with the exception that the actual language used by the legislature, identifying deletions (in brackets) and additions (in capital letters) is as follows:

> (b) At the time of posting of the bottle, can, keg or barrel and case price required by section 30-63, AS AMENDED BY SECTION 1 OF THIS ACT, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that AT THE TIME OF POSTING the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees [during the period of the posting will be] IS no higher than the lowest price at which each such item of beer is [or will be] sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state. [, at any time during the calendar month covered by such posting.]

12. That portion of paragraph 36 which reads ". . . which was not amended, and remains in full force and effect . . ." is denied. The rest and remainder of the paragraph is admitted.

13. As to paragraph 37, that portion which reads ". . . Section 3(c) of Pub. Act 84-332, which creates a new Section 30-63(e) of the Liquor Control Act, declares that the affirmation requirement does not prohibit an out-of-state shipper from changing prices in the Border States, . . ." is admitted. The rest and remainder of the paragraph is denied.

14. As to paragraph 38, the last sentence is denied. The rest and remainder of the paragraph is admitted.

15. As to paragraph 40, that portion which reads, "Finally, the beer price affirmation provisions not only mandate the price at which beer must be sold in Connecticut and below which it cannot be sold in the Border States . . ." is denied. The rest and remainder of the paragraph is admitted.

16. The Defendants' answers to paragraph 1-43 are hereby incorporated and made Defendants' answer to paragraph 44.

Count II

1. The Defendants' answers to paragraphs 1-46 of Count I are hereby incorporated and made Defendants' answer to paragraph 47.

2. Paragraphs 48 and 49 are denied.

Count III

1. The Defendants' answers to paragraphs 1-49 of Counts I and II are hereby incorporated and made Defendants' answer to paragraph 50.

2. Paragraphs 51 and 52 are denied.

Count IV

1. Paragraph 53, 54 and 56 are denied.

2. As to the first two sentences of paragraph 55, the Defendants do not have sufficient knowledge upon which to form a belief and leave Plaintiffs to the proof thereof. The third sentence is admitted. The rest and remainder of said paragraph is denied.

Irreparable Injury

1. Paragraph 57 is denied.

SECOND DEFENSE

1. The Complaint fails to state a claim against the Defendants upon which relief can be granted.

2. The beer price affirmation provisions, as amended, do not control prices at which beer may be sold outside of the state, in violation of the Commerce Clause of the U.S. Constitution.

3. The beer price affirmation provisions, as amended, do not create a statutory mechanism which protects against interstate competition in violation of the Commerce Clause of the U.S. Constitution.

4. The beer price affirmation provisions, as amended, do not create a statutory mechanism which imposes an undue and excessive burden on interstate commerce in violation of the Commerce Clause of the U.S. Constitution.

5. Inasmuch as the beer price affirmation provisions are not yet in effect, this case is in the same posture as the case of *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 US 35 (1966) and should be likewise dismissed.

6. Plaintiffs have presented no facts which demonstrate that the beer price affirmation provisions, as applied in this case, constitute an unlawful burden on interstate commerce.

7. The State interests in this case, embodied in the beer price affirmation provisions as amended by the Connecticut General Assembly pursuant to the Twenty-first Amendment of the U.S. Constitution outweigh the purported interests of the Plaintiffs allegedly protected by the Commerce Clause of the U.S. Constitution.

THIRD DEFENSE

1. The Complaint fails to state a claim against the Defendants upon which relief can be granted.

2. The beer price affirmation provisions, as amended, do not create a statutory mechanism which is violative of the Sherman Act or the Supremacy Clause of the U.S. Constitution.

3. The beer price affirmation provisions, as amended, establish a statutory mechanism which is immune from the Sherman Act under the State Action Immunity Doctrine, also referred to as the Parker v. Brown Doctrine.

FOURTH DEFENSE

1. The Complaint fails to state a claim against the Defendants upon which relief can be granted.

2. The beer price affirmation provisions, as amended and as interpreted by the Connecticut Department of Liquor Control, correct the deficiencies which caused the former law to be held unconstitutional in *U.S. Brewers Ass'n v. Healy*, 692 F.2d 275 (2nd Cir., 1982), aff'd 104 S.Ct. 265 (1983).

FIFTH DEFENSE

1. In the alternative, the court should stay action in this case with respect to the Commerce Clause under the doctrine of abstention since the case presents a question of statutory interpretation of first impression arising under the Connecticut Liquor Control Act which should first be resolved in the State Supreme Court and the resolution of which would obviate this constitutional question.

Respectfully submitted,

THE DEFENDANTS
JOHN F. HEALY, ET AL.

JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

BY /s/ Richard M. Sheridan

Richard M. Sheridan
Assistant Attorney General
555 Russell Road
P.O. Box 11424
Newington, Conn. 06111
Tel: 566-7570

BY /s/ Robert F. Vacchelli

Robert F. Vacchelli
Assistant Attorney General
555 Russell Road
Newington, Conn. 06111
Tel: 566-7570

BY R. Langer /s/ LFM

Robert M. Langer
Assistant Attorney General
30 Trinity Street
Hartford, Conn. 06115
Tel: 566-5374

[Affidavit of Service omitted in printing]

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

NO. H84 816 PCD

AUGUST 30, 1984

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND, IN THE ALTERNATIVE, MOTION FOR STAY

The Defendants respectfully move, pursuant to Rule 56 of the Federal Rules of Civil Procedure and upon the memorandum, affidavit and other documents filed or referred to by the Defendants, that Summary Judgment be entered for the Defendants on the grounds that:

There is no general issue of material fact that, Public Act 84-332, Public Act 84-432 and C.G.S. Sec. 30-63a(b), concerning the beer price affirmation provisions of the Connecticut Liquor Control Act, as interpreted by the Connecticut Liquor Control Commission:

1. Do not violate the Commerce Clause of the United States Constitution, Article I, Section 8, clause 3; and

2. Do not violate Section 1 of the Sherman Act, 15 U.S.C. Sec. 1, or the Supremacy Clause of the U.S. Constitution, Article IV, clause 2; or are immune from the Sherman Act.

In the alternative, we move for an order staying further proceedings in this case, with respect to the Commerce Clause issues only, pursuant to the doctrine of abstention.

Respectfully submitted,

THE DEFENDANTS
JOHN F. HEALY, ET AL.

JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

BY /s/ Richard M. Sheridan

Richard M. Sheridan
Assistant Attorney General
555 Russell Road
P.O. Box 11424
Newington, Conn. 06111
Tel: 566-7570

BY /s/ Robert F. Vacchelli

Robert F. Vacchelli
Assistant Attorney General
P.O. Box 11424
555 Russell Road
Newington, Conn. 06111
Tel: 566-7570

BY R. Langer /s/ LFM

Robert M. Langer
Assistant Attorney General
30 Trinity Street
Hartford, Conn. 06115
Tel: 566-5374

[Certificate of Service omitted in printing]

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

NO. H84 816 PCD

AUGUST 30, 1984

AFFIDAVIT

State of Connecticut)
) ss: Hartford August 30, 1984

County of Hartford

We, the undersigned, John F. Healy, Chairman, and David L. Snyder, Commissioner, being duly sworn, do depose and say:

1. We are over the age of 21 and believe in the obligation of an oath.

2. We comprise the Commissioners of the Department of Liquor Control of the State of Connecticut.

3. As such Commissioners we are empowered, pursuant to Sec. 30-6 Connecticut General Statutes, to enforce the provisions of the Connecticut Liquor Control Act. We are further empowered by said section to do whatever is reasonably necessary for the carrying out of the intent of said Liquor Control Act.

4. We make this affidavit in order that the United States District Court, and all others concerned and/or affected, may have certain knowledge of the manner in which this department shall interpret and implement Public Act 84-332; Public Act 84-432; and C.G.S. Sec. 30-63a(b). The contents of this affidavit constitutes a declaratory ruling of the Department

of Liquor Control pursuant to the provisions of C.G.S. Sec. 4-176.

5. We hereafter set forth, in a construct keyed to the allegations of the complaint in the above captioned matter, our official interpretation of Public Act 84-332; Public Act 84-342; and, C.G.S. Sec. 30-63a(b), thereby establishing how we shall enforce, and expect compliance with, these interrelated sections.

a. Under the changes effected by Sec. 3 of Public Act 332, which amends C.G.S. Sec. 30-63(b), the brewer must now affirm that, *at the time of the posting* (and only at the time of the posting), the price *is* no higher than the lowest price in a surrounding state. Under the old law, at the time of posting, the brewer had to affirm that the price *would be* no higher than the lowest price in any state bordering this state at any time during the calendar month covered by such posting.

b. While C.G.S. Sec. 30-63a(b) of the Connecticut General Statutes was not amended, we must interpret such section in light of the obvious intention of the Connecticut General Assembly as expressed by Senator Dorr at pp. 1277-78 of the Senate Proceedings for April 18, 1984. Accordingly, we determine and declare that C.G.S. Sec. 30-63a(b) mandates only that the brewer in a sale to a Connecticut wholesaler not exceed its previously posted price in Connecticut, but that a sale at a price lower in a border state, during the calendar month covered by such posting, does not contravene this section. (See paragraph 36, complaint).

c. Consistent therewith Sec. 3(e) of Public Act 84-332 creates C.G.S. Sec. 30-63b(e) which permits an out-of-state shipper to change prices in any border state during the calendar month covered by the posting. To the extent, and only to the extent, that C.G.S. Sec. 30-63a(b) is inconsistent with the intention of the legislature and conflicts with new C.G.S. Sec. 30-63b(e), it must be considered impliedly repealed since the latest expression of the legislature controls. Thus under the

new affirmation scheme an out-of-state shipper is free to lower any border state price below the previously affirmed Connecticut price. (See paragraph 37, complaint).

d. Pursuant to Sec. 2-30b, Connecticut General Statutes, we must, and do, read Public Acts 82-332 and 82-342 harmoniously so that the "lowest price" in the border states is to be determined at the time of the posting and *not* during the period covered by the posting. (See paragraph 39, complaint).

Dated at Hartford, Connecticut, this 30th day of August, 1984.

/s/ John F. Healy
John F. Healy

/s/ David L. Snyder
David L. Snyder

[Jurat omitted in printing]

[Certificate of Service omitted in printing]

DECLARATORY RULING

Please be advised that the attached affidavit, filed in the United States District Court for the District of Connecticuut in U.S. Brewer's Ass'n v. Healy, No. H84 816 PCD, constitutes our Declaratory Ruling concerning the Beer Price Affirmation Provisions of the Connecticut Liquor Control Act, pursuant to C.G.S. Sec. 4-176.

/s/ John F. Healy

JOHN F. HEALY, CHAIRMAN

/s/ David L. Snyder

DAVID L. SNYDER, COMMISSIONER

Substitute Senate Bill No. 351

PUBLIC ACT NO. 84-332

AN ACT CONCERNING AFFIRMATION OF THE WHOLESALE PRICE OF SPIRITS, WINE AND BEER.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Subsection (c) of section 30-63 of the general statutes is repealed and the following is substituted in lieu thereof:

(c) Each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department, ON A MONTHLY BASIS, the bottle, can and case price, and for beer, the price per keg or barrel or fractional unit thereof, of any brand of goods offered for sale in Connecticut, which price when so posted shall be the controlling price for such manufacturer, wholesaler or out-of-state permittee for the month following such posting. Notice of all manufacturer, wholesaler and out-of-state shipper permittee prices shall be given to permittee purchasers by direct mail or advertising in a trade publication having circulation among the retail permittees except a wholesaler permittee may give such notice by hand delivery. Price postings with the department setting forth wholesale prices to retailers shall be available for inspection during regular business hours at the offices of the department by manufacturers and wholesalers until three o'clock p.m. of the first business day after the last day for posting prices. A manufacturer or wholesaler may amend his posted price for any month to meet a lower price posted by another manufacturer or wholesaler with respect to alcoholic liquor bearing the same brand or trade name and of like age, vintage, quality and unit container size: provided that any such amended price posting shall be filed before three o'clock p.m. of the fourth business day after the last day for posting prices; and provided further such amended posting shall not set forth

prices lower than those being met. Any manufacturer or wholesaler posting an amended price shall, at the time of posting, identify in writing the specific posting being met.

Sec. 2. Section 30-63a of the general statutes is amended by adding subsection (c) as follows:

(NEW) (c) No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale, to a wholesaler permittee any brand of wine as defined in section 30-1, at a bottle, can or case price higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any other state of the United States or in the District of Columbia or to any state, including an agency of such state, which owns and operates retail liquor outlets.

Sec. 3. Section 30-63b of the general statutes is repealed and the following is substituted in lieu thereof:

(a) At the time of posting of the bottle, can and case price required by section 30-63, AS AMENDED BY SECTION 1 OF THIS ACT, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of such alcohol and spirits posted certifying that AT THE TIME OF POSTING the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees [during the period of the posting will be] IS no higher than the lowest price at which each such item of alcoholic liquor is [or will be] sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets, [, at any time during the calendar month covered by such posting.]

(b) At the time of posting of the bottle, can, keg or barrel and case price required by section 30-63, AS AMENDED BY SECTION 1 OF THIS ACT, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that AT THE TIME OF POSTING the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees [during the period of the posting will be] IS no higher than the lowest price at which each such item of beer is [or will be] sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state. [, at any time during the calendar month covered by such posting.]

(c) AT THE TIME OF POSTING OF THE BOTTLE, CAN AND CASE PRICE REQUIRED BY SECTION 30-63, AS AMENDED BY SECTION 1 OF THIS ACT, EVERY HOLDER OF A MANUFACTURER OR OUT-OF-STATE SHIPPER'S PERMIT, OR THE AUTHORIZED REPRESENTATIVE OF A MANUFACTURER, SHALL FILE WITH THE DEPARTMENT OF LIQUOR CONTROL A WRITTEN AFFIRMATION UNDER OATH BY THE MANUFACTURER OR OUT-OF-STATE SHIPPER OF EACH BRAND OF WINE POSTED CERTIFYING THAT AT THE TIME OF POSTING THE BOTTLE, CAN OR CASE PRICE TO THE WHOLESALER PERMITTEES IS NO HIGHER THAN THE LOWEST PRICE AT WHICH EACH SUCH ITEM OF WINE IS SOLD, OFFERED FOR SALE, SHIPPED, TRANSPORTED OR DELIVERED BY SUCH MANUFACTURER OR OUT-OF-STATE SHIPPER TO ANY WHOLESALER IN ANY OTHER STATE OF THE UNITED STATES OR IN THE DISTRICT OF COLUMBIA, OR TO ANY STATE OR AGENCY OF A STATE WHICH OWNS AND OPERATES RETAIL LIQUOR OUTLETS.

[(c)] (d) By and with the consent of the department a manufacturer or out-of-state shipper may file with the department the affirmation required by this section once and may certify thereon that such affirmation shall remain in full force and effect until rescinded by said manufacturer or out-of-state shipper; such rescission to be effective at the beginning of a new posting period required by section 30-63, AS AMENDED BY SECTION 1 OF THIS ACT, and such notice of rescission shall be given at least fifteen days before its effective date. In the event of the rescission of an affirmation such manufacturer or out-of-state shipper shall not ship, transport, deliver, sell or offer to sell to a wholesaler permittee until a new affirmation is filed with said department in accordance with the provisions of this section.

(e) THIS SECTION SHALL NOT PROHIBIT A MANUFACTURER OR OUT-OF-STATE SHIPPER PERMITTEE OR THE AUTHORIZED REPRESENTATIVE OF A MANUFACTURER FROM CHANGING PRICES TO ANY WHOLESALER IN ANY OTHER STATE OF THE UNITED STATES OR IN THE DISTRICT OF COLUMBIA, OR TO ANY STATE OR AGENCY OF A STATE WHICH OWNS AND OPERATES RETAIL LIQUOR OUTLETS AT ANY TIME DURING THE CALENDAR MONTH COVERED BY SUCH POSTING.

Sec. 4. Section 30-63c of the general statutes is repealed and the following is substituted in lieu thereof:

(a) In determining the lowest price for which any item of such alcohol and spirits is or was sold, offered for sale, shipped, transported or delivered [during such posted period] AT THE TIME OF POSTING by any manufacturer or out-of-state shipper to a wholesaler in any other state or in the District of Columbia or to any state or state agency which owns and operates retail liquor outlets, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any

such wholesaler in another state or in the District of Columbia or to any state or state agency which owns and operates retail liquor outlets; provided that differentials in price which make only due allowance for differences in state taxes and fees and for the actual cost of delivery are permissible.

(b) In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered [during such posted period] AT THE TIME OF POSTING by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any such wholesaler; provided that differentials in price which make only due allowance for differences in state taxes and fees and for the actual cost of delivery are permissible. As used in this section, the term "state taxes and fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon a gallon or liter of such alcohol and spirits or each barrel, or fractional unit thereof, of beer and the term "gallon" shall mean one hundred twenty-eight fluid ounces and the term "liter" shall mean one thousand milliliters and the term "barrel" means not less than twenty-eight nor more than thirty-one gallons. A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes, approved by the department of liquor control, of his brand which he offers to any wholesaler in any state bordering this state.

(c) IN DETERMINING THE LOWEST PRICE FOR WHICH ANY ITEM OF WINE IS OR WAS SOLD, OFFERED FOR SALE, SHIPPED, TRANSPORTED OR DELIVERED AT THE TIME OF POSTING, BY ANY MANUFACTURER OR OUT-OF-STATE SHIPPER TO A WHOLESALER IN ANY OTHER STATE OR IN THE DISTRICT OF COLUMBIA OR TO ANY STATE OR STATE AGENCY WHICH OWNS AND OPERATES RETAIL LIQUOR OUTLETS, APPROPRIATE REDUCTIONS

WILL BE MADE FOR ALL DISCOUNTS, REBATES, FREE GOODS, ALLOWANCES AND OTHER INDUCEMENTS OF ANY KIND WHATSOEVER, INCLUDING DEPLETION AND FLOOR-STOCK ALLOWANCES, OFFERED OR GIVEN TO ANY SUCH WHOLESALER IN ANOTHER STATE OR IN THE DISTRICT OF COLUMBIA OR TO ANY STATE OR STATE AGENCY WHICH OWNS AND OPERATES RETAIL LIQUOR OUTLETS, PROVIDED DIFFERENTIALS IN PRICE WHICH MAKE ONLY DUE ALLOWANCE FOR DIFFERENCES IN STATE TAXES AND FEES AND FOR THE ACTUAL COST OF DELIVERY ARE PERMISSIBLE.

Substitute Senate Bill No. 429

PUBLIC ACT NO. 84-432

AN ACT CONCERNING PRICES AND APPOINTMENT OF DISTRIBUTORSHIPS FOR BEER WHOLESALERS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Subsection (b) of section 30-63c of the general statutes is repealed and the following is substituted in lieu thereof:

(b) In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered during such posted period by any manufacturer of out-of-state shipper to a wholesaler in any state bordering this state, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any such wholesaler; provided that differentials in state taxes and fees and for the actual cost of delivery are permissible. As used in this section, the term "ACTUAL COST OF DELIVERY" SHALL MEAN

THOSE EXPENSES INCURRED BY SUCH MANUFACTURER OR OUT-OF-STATE SHIPPER IN DELIVERING THE ITEM OF BEER TO THE WHOLESALER FROM THE POINT OF ORIGIN TO THE POINT OF DESTINATION, THE TERM "POINT OF ORIGIN" SHALL MEAN THE LOCATION WHICH HAS BEEN ESTABLISHED THROUGH COURSE OF DEALING AS THE GEOGRAPHIC LOCATION FROM WHICH THE WHOLESALER HAS BEEN CHARGED BY THE MANUFACTURER OR OUT-OF-STATE SHIPPER FOR COSTS OF TRANSPORTATION, NOTWITHSTANDING THE FACT THAT THE ITEM OF BEER MAY HAVE BEEN MANUFACTURED OR BOTTLED AT, OR SHIPPED FROM, A DIFFERENT GEOGRAPHIC LOCATION, THE TERM "POINT OF DESTINATION" SHALL MEAN THE LOCATION WHICH HAS BEEN ESTABLISHED THROUGH COURSE OF DEALING AS THE GEOGRAPHIC LOCATION AT WHICH THE WHOLESALER TAKES DELIVERY OF THE ITEM OF BEER, THE TERM "state taxes and fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon a gallon or liter of such alcohol and spirits of each barrel, or fractional unit thereof, of beer and the term "gallon" shall mean one hundred twenty-eight fluid ounces and the term "liter" shall mean one thousand milliliters and the term "barrel" means not less than twenty-eight nor more than thirty-one gallons. A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes AND PACKAGES, approved by the department of liquor control, of his brand which he offers to any wholesaler in any state bordering this state.

Sec. 2. Subsection (a) of section 30-17 of the general statutes is repealed and the following is substituted in lieu thereof:

(a) (1) A wholesaler permit shall allow the bottling of alcoholic liquor and the wholesale sale of alcoholic liquor to permittees in this state and without the state, as may be permitted by law, and the sale of alcoholic liquors to vessels

engaged in coastwise or foreign commerce, and the sale of alcohol and alcoholic liquor for industrial purposes to nonpermittees, such sales to be made in accordance with the regulations prescribed by the department of liquor control, and the sale of alcohol and alcoholic liquor for medicinal purposes to hospitals and charitable institutions and to religious organizations for sacramental purposes and the receipt from out-of-state shippers of multiple packages of still wines and sparkling wines. The holder of a wholesaler permit may apply for and shall thereupon receive an out-of-state shipper's permit for direct importation from abroad of alcoholic liquors manufactured outside the United States and an out-of-state shipper's permit for direct importation from abroad of beer manufactured outside the United States.

(2) When a holder of a wholesale permit has had the distributorship of any alcohol, beer, spirits or wine product of a manufacturer or out-of-state shipper or their successors or assigns for six months or more, such distributorship may be terminated or its geographic territory diminished upon (A) the execution of a written stipulation by the wholesaler and manufacturer or out-of-state shipper or their successors or assigns agreeing to the change and the approval of such change by the department of liquor control; or (B) the sending of a written notice by registered mail, return receipt requested, by the manufacturer or out-of-state shipper or their successors or assigns to the wholesaler, a copy of which notice has been sent simultaneously by registered mail, return receipt requested, to the department of liquor control. No such termination or diminishment shall become effective except for just and sufficient cause, provided such cause shall be set forth in such notice and the department of liquor control shall determine, after hearing, that just and sufficient cause exists. If an emergency occurs, caused by the wholesaler, prior to such hearing, which threatens the manufacturer's or out-of-state shipper's or their successor's or assign's products or otherwise endangers the business of the manufacturer or out-of-state shipper or their successors or assigns and said emergency is established to the satisfaction of the department of

liquor control, the department may temporarily suspend such wholesaler permit or take whatever reasonable action the department deems advisable to provide for such emergency and the department may continue such temporary action until its decision after a full hearing. The department of liquor control shall render its decision with reasonable promptness following such hearing. Notwithstanding the aforesaid, a manufacturer or out-of-state shipper or their successors or assigns may appoint one or more additional wholesalers as the distributor for an alcohol, [beer,] spirits or wine product within such territory, provided [with regard to alcohol, spirits or wine products] such appointment shall not be effective until six months [, and with regard to beer products one year,] from the date such manufacturer or out-of-state shipper or their successors or assigns shall set forth such intention in written notice to the existing wholesaler by registered mail, return receipt requested, with a copy of such notice simultaneously sent by registered mail, return receipt requested, to the department of liquor control. FOR JUST AND SUFFICIENT CAUSE, A MANUFACTURER OR OUT-OF-STATE SHIPPER OR THEIR SUCCESSORS OR ASSIGNS MAY APPOINT ONE OR MORE ADDITIONAL WHOLESALERS AS THE DISTRIBUTOR FOR A BEER PRODUCT WITHIN SUCH TERRITORY PROVIDED SUCH MANUFACTURER OR OUT-OF-STATE SHIPPER OR THEIR SUCCESSORS OR ASSIGNS SHALL SET FORTH SUCH INTENTION AND CAUSE IN WRITTEN NOTICE TO THE EXISTING WHOLESALER BY REGISTERED MAIL, RETURN RECEIPT REQUESTED, WITH A COPY OF SUCH NOTICE SIMULTANEOUSLY SENT BY REGISTERED MAIL, RETURN RECEIPT REQUESTED, TO THE DEPARTMENT OF LIQUOR CONTROL. For the purposes of this section, just and sufficient cause means the existence of circumstances which, in the opinion of a reasonable person considering all of the equities of both the wholesaler and the manufacturer or out-of-state shipper or their successors or assigns, warrants a termination or a diminishment of a distributorship as the case may be.

(3) Nothing contained herein shall be construed to interfere with the authority of the department of liquor control to retain or adopt reasonable regulations concerning the termination or diminishing of a distributorship held by a wholesaler for less than six months.

(4) ALL HEARINGS HELD HEREUNDER SHALL BE HELD IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER 54.

Sec. 3. This act shall take effect from its passage.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

NO. H84 816 PCD

AUGUST 30, 1984

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to Local Rule 9(c), the Defendants hereby annex to their Motion for Summary Judgment the following statement of material facts as to which, they contend, there is no genuine issue to be tried:

1. The Plaintiff, U.S. Brewers Ass'n, Inc., is an association of companies that brew beer in the United States or that import beer for sale in the United States. Complaint, par. 8.

2. The Plaintiff companies are brewers or importers of beer that do business in Connecticut and are licensed as out-of-state shippers by the Connecticut Department of Liquor Control. Complaint, pars. 9–19.

3. The Defendants, John F. Healy and David L. Snyder, are Commissioners of the Connecticut Department of Liquor Control and are charged with the responsibility of enforcing the provisions of the Connecticut Liquor Control Act, C.G.S. Secs. 30-1 et seq. Complaint, pars. 21–22.

4. The Defendant, Charles W. Kasmer, is Secretary of the Connecticut Department of Liquor Control and he administers many of the day to day affairs of the Department. Complaint, par. 23.

5. The beer price affirmation provisions of the Liquor Control Act, C.G.S. Secs. 30-63a(b), 30-63b(b) and 30-63c(b), were enacted by the Connecticut General Assembly in 1981 in Public Act 81-294. Complaint, par. 29.

6. The beer price affirmation provisions were upheld in *U.S. Brewers Ass'n. Inc. v. Healy*, 532 F.Supp. 1312 (D. Conn., 1982) but, on appeal, were found to be unconstitutional in *U.S. Brewers Ass'n. Inc. v. Healy*, 692 F.2d 275 (2nd Cir., 1982), aff'd with no opinion, ____ U.S. ____, 104 S.Ct. 265, 78 L.Ed.2d 248 (1983). (Copies of decisions attached); Complaint, par. 29.

7. In 1984, the Connecticut General Assembly amended the beer price affirmation provisions in Public Act 84-332 and Public Act. 84-432. Complaint, Exhibits A, B.

8. The declared purpose of Public Act 84-332 was to conform the beer price affirmation provisions to the Court's final decision in *U.S. Brewers Ass'n v. Healy*, supra. Complaint, par. 2; Transcript of legislative debate attached in Exhibit A.

9. The Commissioners of the Department of Liquor Control, by affidavit filed this date, and therein by Declaratory Ruling issued pursuant to C.G.S. Sec. 4-176, interpret the beer price affirmation provisions to conform with the final decision in *U.S. Brewers Ass'n v. Healy*, supra.

10. Public Acts 84-332, 84-432 and C.G.S. Sec. 30-63a(b) were enacted pursuant to the Twenty-first Amendment to the U.S. Constitution.

Respectfully submitted,

THE DEFENDANTS
JOHN F. HEALY, ET AL.

JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

By /s/ Richard M. Sheridan

Richard M. Sheridan
Assistant Attorney General
555 Russell Road
P.O. Box 11424
Newington, Conn. 06111
Tel: 566-7570

By /s/ Robert F. Vacchelli/gmb
Robert F. Vacchelli
Assistant Attorney General
555 Russell Road
P.O. Box 11424
Newington, Conn. 06111
Tel: 566-7570

By /s/ R. Langer /s/ LFM
Robert M. Langer
Assistant Attorney General
30 Trinity Street
Hartford, Conn. 06115
Tel: 566-5374

[Certificate of Service omitted in printing]

EXHIBIT A

[Certificate omitted in printing]

Substitute Senate Bill No. 351

PUBLIC ACT NO. 84-332

AN ACT CONCERNING AFFIRMATION OF THE WHOLESALE PRICE OF SPIRITS, WINE AND BEER.

[Text of Bill omitted in printing]

1984 GENERAL ASSEMBLY

HOUSE OF REPRESENTATIVES

THURSDAY
MAY 3, 1984

* * *

CLERK:

Calendar 619, File No. 268, *Substitute for Senate Bill No. 351*, AN ACT CONCERNING APPLICATION OF THE WHOLESALE PRICE OF SPIRITS, WINE AND BEER. Favorable Report of the Committee on General Law.

REP. MOSLEY: (72nd)

Mr. Speaker.

SPEAKER STOLBERG:

Rep. Maurice Mosley.

REP. MOSLEY: (72nd)

I move acceptance of the Joint Committee's Favorable Report and passage of the bill, Mr. Speaker.

SPEAKER STOLBERG:

Will you remark?

REP. MOSLEY: (72nd)

Mr. Speaker, briefly, Connecticut currently has affirmation on spirits, alcohol and beer and not wine. This bill would essentially do two things. It would include wine in the overall affirmation scheme, and also it will address a federal court's decision and it would specifically allow out-of-state shipper permittees to change their prices and any other state during calendar months covered by Connecticut posting to address the court's decision.

I move passage of the bill, Mr. Speaker.

SPEAKER STOLBERG:

Will you remark further on the bill? Will you remark further? Rep. Mordasky.

REP. MORDASKY: (52nd)

Mr. Speaker, the Clerk has LCO 3352. Would the Clerk please call and I ask permission to summarize.

SPEAKER STOLBERG:

The Clerk has an amendment, LCO 3352, House Amendment Schedule "A". Will the Clerk please call.

CLERK:

LCO No. 3352 designated *House Amendment Schedule "A"*, offered by Reps. Mordasky and Mushinsky.

SPEAKER STOLBERG:

Is there objection to summarization? Seeing none, please proceed.

REP. MORDASKY: (52nd)

Thank you, Mr. Speaker. Very briefly, Mr. Speaker, this amendment puts forth the provisions that the savings be passed on to the retailers and hopefully this way to the consumer.

I move its adoption.

SPEAKER STOLBERG:

Will you remark on House "A"? Will you remark on House "A"?

REP. MOSLEY: (72nd)

Mr. Speaker.

SPEAKER STOLBERG:

Rep. Mosley.

REP. MOSLEY: (72nd)

Just very briefly in opposition to the amendment, Mr. Speaker. The amendment is not practical, not enforceable, and not needed. Presently in checking with the Liquor Control Commission on the affirmation of alcohol spirits and beer, the savings are being passed on. We have gotten lower prices, so the amendment is not needed. Additionally, in terms of the different brands of wine that are being sold in computing the gross profit, it will be extremely difficult. And also checking with the Liquor Control Commission it will be a cost to the State of approximately $75, $76 per year if the amendment passes.

So I'd like to speak in opposition to the amendment, and I also would like a roll call vote on the amendment, Mr. Speaker.

SPEAKER STOLBERG:

The request is for a roll call vote. All those in favor of a roll call vote, please indicate by saying aye.

REPRESENTATIVES:

Aye.

SPEAKER STOLBERG:

Adequate number is arrived at. When the vote is taken it will be taken by roll.

REP. MORDASKY: (52nd)

Mr. Speaker.

SPEAKER STOLBERG:

Will you remark further on the amendment? Rep. Mordasky.

REP. MORDASKY: (52nd)

A question to Rep. Mosley, please.

SPEAKER STOLBERG:

Please frame your question, sir.

REP. MORDASKY: (52nd)

Thank you, sir. Through you, sir, I also got that fiscal note from OLR, and maybe I can't figure it out. I didn't do so good last night, but on lines 4, 5, and 6 and 7, on the file copy which says there's no fiscal impact, it says each manufacturer, wholesaler, and out of state shipper permittees shall post with the department on a monthly basis, etc.

On my bill, on line, in the amendment on line 35 it says "at time of posting of the bottle" etc. What difference does it make?

SPEAKER STOLBERG:

Rep. Mosley, do you care to respond?

REP. MOSLEY: (72nd)

I believe in the amendment they have a number 6 which is [illegible] the gross mark up, and I believe that would have to be [illegible]mined. The wholesaler doesn't have to hire

somebody to determine that, and in order to check that according to the fiscal note, I believe the Liquor Control Commission will need two additional accountants and probably a clerk to adequately monitor and check those procedures.

REP. MORDASKY: (52nd)

Mr. Speaker, through you to Rep. Mosley, another question, please.

SPEAKER STOLBERG:

Please frame your question.

REP. MORDASKY: (52nd)

Rep. Mosley, through you, sir, do you mean to tell me they're not going to check on the monthly basis at all? They're not going to send anybody out there?

SPEAKER STOLBERG:

Rep. Mosley, do you care to respond?

REP. MOSLEY: (72nd)

Mr. Speaker, through you, I really don't understand the question. Perhaps he could restate it. I don't understand the question, sir.

SPEAKER STOLBERG:

Rep. Mordasky, could you restate the question.

REP MORDASKY: (52nd)

Mr. Speaker, on the file copy, through you, sir, it says on a monthly basis the bottle, can and etc. case price is going to be posted. Are they not going to send a man out to check that on a monthly basis?

REP. MOSLEY: (72nd)

Through you, Mr. Speaker.

SPEAKER STOLBERG:

Rep. Mosley.

REP. MOSLEY: (72nd)

Mr. Speaker, I believe they would have to. However, under this amendment you would need additional people power in the Liquor Control Commission to adequately supervise and monitor and implement this amendment.

REP. MORDASKY: (52nd)

Mr. Speaker, through you.

SPEAKER STOLBERG:

Rep. Mordasky.

REP. MORDASKY: (52nd)

This is the question. It seems that if they send the same man out to look at the monthly listing of the prices, why can't he check it all at once?

SPEAKER STOLBERG:

Rep. Mosley.

REP. MOSLEY: (72nd)

Through you, just briefly, it's my understanding that a man is not sent out but prices are sent to a Liquor Control Commission, and most of the checkin, is done in-house, and under this bill in terms of checking for gross profits, you're

going to need additional individuals, additional accountants to check.

REP. MORDASKY: (52nd)

Through you, Mr. Speaker, another question, please.

SPEAKER STOLBERG:

Please frame your question.

REP. MORDASKY: (52nd)

Thank you, Mr. Speaker. Through you, why can't they send the whole business into the liquor commission and let the liquor commission check it out?

SPEAKER STOLBERG:

Rep. Mosley.

REP. MOSLEY: (72nd)

Through you, Mr. Speaker. You have to have additional accountants checking the material, checking the work that's being sent in, and according to the fiscal note, that's approximately $76,000 for the entire fiscal year.

REP. MORDASKY: (52nd)

Mr. Speaker, I had a little confusion when I read this file copy and found that there was no extra cost, and I called the Office of Fiscal Analysis about the money that they charge me on the amendment, and it says, and this is what they sent back.

While the amendment does not specifically require the Department of Liquor Control to perform additional duties, and thus can be construed to have no fiscal impact, the

department has indicated that the need for staff to do compliance audit of the wholesalers. I don't understand it. They audit the wholesalers now, don't they? Through you, Mr. Speaker.

SPEAKER STOLBERG:

Rep. Mosley, do you care to respond?

REP. MOSLEY: (72nd)

Through you, Mr. Speaker. I think I adequately answered your question. Through you.

SPEAKER STOLBERG:

Rep. Mordasky, you have the floor.

REP. MORDASKY: (52nd)

That's all. Thank you very much, sir.

SPEAKER STOLBERG:

Will you remark further on the bill? Will you remark further? Rep. John Woodcock.

REP. WOODCOCK: (14th)

Mr. Speaker, members of the House, the question before us with this amendment and mostly with this bill, who do we believe? In 1981 we deliberated on an affirmation bill which was one of the most heavily lobbied bills in that session.

In 1984 the same situation exists. The '81 statute was ultimately struck down by the Supreme Court of the United States as being unconstitutional, as being price-fixing, as being a restraint on trade, and as being one that interfered with the commerce clause. At the same time, the 1981 House

and General Assembly received information from the wholesalers here in our state that affirmation would save our consumers money.

There is no evidence or no proof that I have seen yet that affirmation saved money. In fact, the work that has been done by the Office of Legislative Research has indicated that prices went up after affirmation went on the books. Also, when affirmation was struck down, prices stabilized. They did not go up as one would expect if indeed affirmation was holding prices down for the general public. I think what we have to do here is we've got to decide who we want to represent. Do we want to represent the people that make wine, the people that make beer, the people who sell beer on a wholesale basis in this state? Because what the special interests are asking us to do today is cut the pie so they can share it in the way that they wish to share it.

This is one of the most heavily lobbied bills that the House has seen this entire session. I would not even want to estimate what the payroll has been for lobbyists on this, and I must commend the lobbyists for the job that they have done. They have presented their case in a very coherent and sometimes plausible fashion.

One does not know which to believe. But I think if we're truly going to be paying attention to the public's best interests then we should leave the marketplace alone and let the marketplace dictate what prices will be. And if we're really looking after the public, then we should pass this consumer bill advocated this afternoon by Rep. Mushinsky and Rep. Mordasky. The question is are we really in favor of a consumer pass-through? We have no evidence whatsoever that affirmation has saved any consumers any money. We have plenty of evidence to the opposite that the special interests want this bill very much. Please support the amendment.

SPEAKER STOLBERG:

Will you remark further on the amendment? Rep. Mushinsky.

REP. MUSHINSKY: (85th)

I'm not convinced that the bill itself will lower prices. Beer is a different animal than the more commonly affirmed hard liquor. It's true that hard liquor affirmation has lowered prices. You can see that if you check the figures. But if you ask OLR for figures on beer affirmation the short time we had it, OLR concluded it did not appear to have a great effect on prices to Connecticut wholesalers.

Three of the major brands went up. Four of the major brands went down, and two had no change. I asked them what could we do to this bill to get the possible savings down to the consumers, and they said you really would have to price fix all the way down to the consumer's level, but that would be impossible to regulate. You would have so many staff required. This amendment doesn't go all the way to the bottom, but it's as far as we can go at a low cost. It's as close as we can get to the consumer, bringing it down to the 5,000 number of retailers and we urge your adoption of the amendment. If this amendment fails, we urge your rejection of the bill.

SPEAKER STOLBERG:

Will you remark further on the amendment? Rep. Walkovich. Rep. Scully was first, and then Rep. Walkovich.

REP. SCULLY: (75th)

Mr. Speaker, I rise in opposition to the amendment. The people who fought this bill all along were both the wholesalers and the people who manufacture these products. Now, if they were against it, there must be something good about it. We

also have to remember that beer pricing has a great deal of flux through New England because of the question of the bottle bill.

The bottle bill was passed early in this state, but the other states have just been following, so the beer prices have really been in flux. You can't make some very fair comparisons on the beer prices. Last but not least, just three years ago we did away with minimum mark up in this state. Many of you here voted for doing away with minimum mark up again, something that the people didn't want, which we didn't want, which we supported doing away with. To support this amendment I think is the wrong thing to do at this time.

SPEAKER STOLBERG:

Will you remark further?

REP. BENVENUTO: (151st)

Mr. Speaker.

SPEAKER STOLBERG:

Rep. Benvenuto.

REP. BENVENUTO: (151st)

I'd like to excuse myself for a possible conflict of interest.

SPEAKER STOLBERG:

The Journal will so note, sir. Rep. Walkovich.

REP. WALKOVICH: (109th)

Mr. Speaker, a question through you to the proponent of the amendment.

SPEAKER STOLBERG:

Please frame your question.

REP. WALKOVICH: (109th)

Rep. Mordasky, is there any cap on the amount of increase which a retailer can charge after he has received the product from the wholesaler?

SPEAKER STOLBERG:

Rep. Mordasky.

REP. MORDASKY: (52nd)

Through you, sir, there is no cap. And we hope that the 5,000 retailers would be in enough competition with each other to bring a lower price to the consumer. You know, it's a combination of 19 wholesalers and 5,000 retailers.

REP. WALKOVICH: (109th)

Mr. Speaker, speaking in opposition to the amendment, I think Rep. Mordasky has just proven that this is a false pass-through. We're saying that shifting a cap on the amount of increase that the wholesaler could charge to the retailer, and yet the retailer can charge whatever he pleases. If the cap is good for the wholesaler, it should be good for the retailer.

If the open market competition is good for the retailer, it should be good for the wholesaler. Mr. Speaker, this is a false amendment. It's an attempt to kill the bill. This amendment couldn't even get a sponsor in the Senate. Therefore, I would move opposition to the amendment.

SPEAKER STOLBERG:

Will you remark further on the amendment?

REP. MOYNIHAN: (10th)

Mr. Speaker.

SPEAKER STOLBERG:

Rep. Moynihan: (10th)

Mr. Speaker, I rise to speak in opposition to the amendment. I think it's interesting that the amendment is being fostered upon this body by the group that really has been lobbying most of the session and going back three years to kill the whole issue of affirmation.

It really has nothing to do with pass-through. If that was the case, then they would have been in favor of affirmation over the last three years with an affirmation amendment. Instead, they want the courts to strike our affirmation law. Let me give you a little history about how we got to this perspective to start off with.

For several years we fought the issue of repeal of minimum mark up, going to a free market. When the compromise finally came up three years ago and we decided to open up competition among our retailers and among our wholesalers so they were no longer protected by minimum mark up. What we are concerned is the leverage of the State stores had in purchasing and the border states, the very large states, and the enormous size of their wholesalers and retailers, that our wholesalers and retailers would be at a disadvantage because so many of our consumers had gotten in the habit of going across the border.

At that time, as part of the compromise, for those of you who were here, the bill sat on the Senate Calendar for six weeks. If you think this issue was lobbied, you should have been here then. And the tugging and pulling that went back and forth, and as part of the final agreement, beer affirmation was put in. We've always had liquor affirmation, and

wine affirmation was given a moratorium. I think the moratorium has passed, and I think it's appropriate. Let us find out. Let us open the market to see that prices are realistically offered in Connecticut as they are in adjacent states, and let us see.

And if we find out that it is the case where there are not savings that come to the consumer, then I think we ought to address it. But we should not go back to trying to price fix margins in terms of relationships on individual purchases as this amendment tries to do. Bearing in mind that this amendment is being brought to you by those that have opposed affirmation for the entire session. We did get into it before we went to repeal the minimum mark up. We did get into an issue of when distillers and vintners primarily go for post-offs on pricing, that that was able to be passed through on a monthly basis to retailers. We tracked that very carefully in the late 70's, and we found out the evidence is clearly there that those post-offs and reductions in prices were passed from the wholesalers to the retailers and ultimately to the consumers.

And those were the specials that you began to see offered in the late 70's in our package stores before we went the full route of repeal. I think the bill is proper. I think the amendment before us does not come well-grounded in good intentions. And as I say, if it was, this is the issue that you would have seen discussed in committee and in the process for the last several months. It would have been the issue of this amendment, but instead it was the issue of let's kill affirmation. That's why it's here today. I urge defeat of the amendment.

SPEAKER STOLBERG:

Will you remark further on the amendment? Will you remark further? Rep. Fusscas.

REP. FUSSCAS: (55th)

Thank you, Mr. Speaker. I have some questions about the amendment. I'm confused. And through you, if I may, to Rep. Mordasky, could you tell me, sir, what this would cost to implement at the wholesale basis, one wholesaler?

SPEAKER STOLBERG:

Rep. Mordasky.

REP. MORDASKY: (52nd)

Through you, Mr. Speaker, I don't have any idea, but the 19 wholesalers make $420 million. They ought to be able to hire a secretary to take care of it.

REP. FUSSCAS: (55th)

Thank you, Rep. Mordasky. Another question, it's new, section d. And in reference to wine, is it my understanding that if you had a gross mark up of let's say 50¢ per bottle of wine, which is the average gross mark up through the past 340 days, if that wine was to go up in cost to the wholesaler, he could not charge more than that 50¢ average gross up?

REP. MORDASKY: (52nd)

Through you, Mr. Speaker, I don't believe he could. It would be the average.

REP. FUSSCAS: (55th)

If I may, through you, Mr. Speaker, pose one more question.

SPEAKER STOLBERG:

Rep. Fusscas.

REP. FUSSCAS: (55th)

Wine in a bad year sells at a discount. Suppose we had a very good year and it was selling at a premium, and let's say that it doubled and tripled in cost. Are you saying then that a bottle of wine the wholesaler bought for $5 that he's now buying for $15, he's getting the same small percentage?

REP. MORDASKY: (52nd)

It is a percentage, through you, sir, it would be a percentage and therefore as percentage would follow through. A percentage of the previous 12 months.

REP. FUSSCAS: (55th)

One more question, Mr. Speaker.

SPEAKER STOLBERG:

Rep. Fusscas.

REP. FUSSCAS: (55th)

If his average gross mark up in a percentage was 10% of the $15 as well as the $5. Is that correct?

REP. MORDASKY: (52nd)

It would be the percentage of the profit that he would make, yes.

REP. FUSSCAS: (55th)

I have no other questions.

SPEAKER STOLBERG:

Will you remark further on the amendment?

REP. VAN NORSTRAND: (141st)

Mr. Speaker.

SPEAKER STOLBERG:

Rep. Van Norstrand.

REP. VAN NORSTRAND: (141st)

I don't know that I wish to inquire of the proponent as perhaps Rep. Mosley. There was just debate a moment ago which I think I understand as I read this. The last part of well, really, lines 29 through 32, as I read the amendment, it says if you introduce a new product unlike the part from lines 23 through 29, or 28, if you, which says each item. If you introduce a new product, your mark up is tied, on line 31½ to the permittee's average gross mark up on all items sold by such permittee during such period. Through you, Mr. Speaker, to Rep. Mosley, as I understand it, profits will vary from wine to beer, historically, indeed even when there was minimum mark up, the fixed mark ups were quite different, and I suspect in a semi-free market are to this day. If you had to introduce a new item and say it was a wine and it was historically marked up considerably more than say beer was, would you not be in trouble under the second part of this new subsection d in that the beer, the historic 12-month average of all the beer items you were selling would pull down any permissible mark up perhaps to a price which makes it unworkable?

REP. MOSLEY: (72nd)

Through you, Mr. Speaker.

SPEAKER STOLBERG:

Rep. Mosley.

REP. MOSLEY: (72nd)

That's correct, Mr. Speaker.

REP. VAN NORSTRAND: (141st)

People can feel whatever they want to about whatever they want to do as consumers, but I think they can't deal with this amendment. It is seriously flawed in that regard because the second part says "all items" and that average could be very low.

SPEAKER STOLBERG:

Will you remark further on the amendment? Rep. Miscikoski.

REP. MISCIKOSKI: (65th)

Thank you, Mr. Speaker. Mr. Speaker and members of this House, you know it's always fascinating. Every time there's a bill that comes up involves drinking, you know, the State rips everybody off now. There's nobody that pays these licenses. You've heard the story before. Now we're discussing their profits. We never discuss the profits the lawyers make, the doctors make, the dentists, or anybody else. The auto industry that keeps ripping us off, that's why their profits are great.

That's why you have to pay for the price of the car the way it is. We don't debate that here. We're always picking on one industry. I only regret that 22 years ago I didn't start screaming like I been screaming lately, because the people in the liquor industry, they're constantly being criticized one way or another and constantly being ripped off by government. Every time they want taxes, they go up and bag them.

You know, what's the difference how much money they make? They're in business to make money. They create jobs.

It's like I said, my father always said that I hope the Torrington company makes a lot of money. Then he says, I'll always have a job. You know, it's getting tougher and tougher and tougher to do business in this state. We're constantly bagging the people that create jobs.

If it isn't taxes, it's some stupid law, and boy, do we pass a lot of stupid laws here, and the public out there is sick and tired of the garbage that we do here. If you don't believe me, go out there and ask them in the street. I used to live with the public when I ran a restaurant. You know, it's about time. Let's go after some other people. Why pick on the same industry over and over, I don't give a damn what it is?

It's the only industry that they pick on, and I'm only sorry that I didn't start this campaign to start working in their behalf 22 years ago. Because most of the people who are involved in this business are constantly working hard and they have to take all the crap that we give them from government. Thank you.

SPEAKER STOLBERG:

Will you remark further on the amendment? Oh, I'm sorry, I thought that was the concluding remark we just had. Rep. Prague.

REP. PRAGUE: (8th)

I just have a question, Mr. Speaker. Far be it from me to push the liquor industry, but business is business, and I would like to ask through you, Mr. Speaker, a question of Rep. Mordasky.

SPEAKER STOLBERG:

Please frame your question, madame.

REP. PRAGUE: (8th)

Rep. Mordasky, if a wholesaler is tied, you know, to a price of beer that was sold to him by the brewery for a whole year, what happens if in his business the cost of his electricity goes up or his telephone goes up or the variables that exist in any business? Is he as a businessman entitled, you know, to increase his charges depending on his costs?

REP. MORDASKY: (52nd)

Through you, Mr. Speaker.

SPEAKER STOLBERG:

Yes, sir.

REP. MORDASKY: (52nd)

Through you, Mr. Speaker, the lobbyist told me that there was any cost and increase in labor that the industry would have to eat it, and I don't think that's any different from the dairy industry. Axle weights are going to cost the price of hauling milk 8$ a hundred. It's going to cost my sons and I $2,000 a year. We got to eat it.

REP. PRAGUE: (8th)

Rep. Mordasky, through you, Mr. Speaker.

SPEAKER STOLBERG:

Rep. Prague.

REP. PRAGUE: (8th)

It's not fair. It's not fair, and I agree with you that the dairy industry, that's not fair.

SPEAKER STOLBERG:

Will all members please be seated. Will staff and guests.

REP. VAN NORSTRAND: (141st)

Mr. Speaker.

SPEAKER STOLBERG:

Rep. Van Norstrand.

REP. VAN NORSTRAND: (141st)

Just to put this in perspective, just so there's not another group for Rep. Miscikoski to defend, I think we all know the dairy industry's been milking us for a long time.

SPEAKER STOLBERG:

Will you remark further on the amendment? Rep. Zajac.

REP. ZAJAC: (83rd)

Yes, Mr. Speaker, and thank you. I think we've gone astray in our deliberations on this really. I think the bottom line you have to ask yourself and there seems to be some doubt in this Chamber whether affirmation in the past has worked. Some feel it has, some feel it hasn't.

I think Rep. Mushinsky in her own statistics she threw out on the floor said that in four cases it worked and in three not. Well, I'd point out that that's across the line of various brands, but I ask you to ask yourself, do you see constituents now shopping more so than ever in Connecticut than they used to, instead of going to Springfield to Town & Country or to Sturbridge Village or across the line in New York? Affirmation, I think you can look at your local papers and the ads within the paper.

And you have seen some real competitive prices, so much so that they're exactly the same price as up in Massachusetts now that they do have a bottle bill, and the fact that the sales tax and collection is different, the bottle prices are so close that people feel they don't have to travel to Massachusetts. It's not worth the extra gas. So affirmation, in fact, is working, has worked, but you have to dig down deeper to evaluate that with the bottle bill situation, sales tax, all the ***

CLERK:

House Amendment Schedule "A" to Senate Bill 351.

Total Number Voting	146
Necessary for Adoption	74
Those Voting Yea	21
Those Voting Nay	125
Those Absent and Not Voting	5

SPEAKER STOLBERG:

The amendment is defeated.

Will you remark further on the bill? If not, will members please be seated.

REP. MORDASKY: (52nd)

Mr. Speaker.

SPEAKER STOLBERG:

Rep. Mordasky.

REP. MORDASKY: (52nd)

On the bill, Mr. Speaker.

SPEAKER STOLBERG:

On the bill.

REP. MORDASKY: (52nd)

Rep. Moynihan talked about a free market. If there's a free market, affirmation doesn't come into a free market. Rep. Zajac said that things were very good now and we were in line with our competition without affirmation, so what do we need the bill for? We want a free market, we don't need affirmation. If things are good now, we don't need affirmation.

I'm against the bill. Vote it down.

SPEAKER STOLBERG:

Will you remark further? Rep. Woodcock.

REP. WOODCOCK: (14th)

Mr. Speaker, just a few things I'd like to share with the Chamber. Again I'd like to state that there is no hard evidence of any kind that affirmation has led to lower prices for the public. In fact, there's only one state that has beer affirmation, and that's the State of New Mexico, and no one was able to furnish me with any information indicating that affirmation had a positive effect with respect to the public's purchasing power.

So I think it's important that the record should reflect that. Also, the State of Connecticut has been put on notice at the public hearing that was held before the General Law Committee in this session that there will be another challenge to this statute. And I'd like to share with you some of the

comments of the Assistant Attorney General who spent two years defending our 1981 statute, which was ultimately struck down by our Supreme Court. Attorney General Richard Sheridan said that the affirmation statute was something that was hard to police. It would not lower prices to the public. It would only lower prices for wholesalers, and that the State of Connecticut had spent well over $150,000 in defending that particular statute.

I would suggest to you that you're going to see this case in court again, and I don't want to sound like a prophet, but I would not be a bit surprised if our statute is once again ruled unconstitutional. I urge the defeat of the bill.

SPEAKER STOLBERG:

Will all members please be seated. Will staff and guests come to the well of the House. Will you remark further on the bill? If not, the machine will be opened.

CLERK:

The House of Representatives is now voting by roll. Members please return to the Chamber immediately. The House of Representatives is currently voting by roll. Members please return to the Chamber immediately.

SPEAKER STOLBERG:

Have all the members voted? Have all the members voted? If all the members have voted, the machine will be locked, and the Clerk will take a tally.

Will the Clerk please announce the tally.

CLERK:

Senate Bill 351.

Total Number Voting	145
Necessary for Passage	76
Those Voting Yea	133
Those Voting Nay	12
Those Absent and Not Voting	6

SPEAKER STOLBERG:

The bill is passed.

* * *

THE CLERK:

Calendar 186, File 268, *Substitute for Senate bill 351*, AN ACT CONCERNING AFFIRMATION OF THE WHOLESALE PRICE OF SPIRITS, WINE AND BEER, Favorable Report of the Committee on General Law. The Clerk has an Amendment.

THE CHAIR:

Senator Dorr.

SENATOR DORR:

Yes Mr. President. I move adoption of the Joint Committee's Favorable Report and passage of the Bill.

THE CHAIR:

Clerk please call the Amendment.

THE CLERK:

Clerk has *Senate Amendment, Schedule A*, LCO 3307.

THE CHAIR:

Senator Dorr.

SENATOR DORR:

Yes Mr. President. That Amendment's been withdrawn.

THE CHAIR:

The Amendment is withdrawn. Any further Amendments?

THE CLERK:

No Mr. President.

THE CHAIR:

Senator Dorr.

SENATOR DORR:

Yes Mr. President. This measure, with respect to this measure, presently manufacturers and out of state shippers of alcohol and spirits are prohibited from selling their products to Connecticut wholesalers at prices which are higher than the lowest price charged for those products in any other state or the District of Columbia and must affirm that fact under oath. Similar affirmation is required of manufacturers and out of state shippers of beer who must charge Connecticut wholesalers the lowest price they charge in bordering states. The prices so affirmed Mr. President, prevail for the entire month after they are posted with the Department of Liquor Control.

This Bill, Mr. President, would alter existing price affirmation requirements and would include wine in the new price posting affirmation system. Prices on all alcoholic beverages sold in Connecticut would be posted on a monthly basis with the Division of Liquor Control but any affirmation as it reflects prices charged anywhere else in the country would apply only to the price existing at the time of posting and not

for the entire month after as is currently required, Mr. President.

This Bill would specifically allow manufacturers and shippers to change wholesale prices on all other states and the District of Columbia at any time during the calendar month covered by the Connecticut posting. Mr. President, if there is no objection to this measure, I would ask that it *be placed on the Consent Calendar.*

THE CHAIR:

Hearing none, *so ordered.*

• • •

THE CHAIR:

Is there any other correction, omission or request to change the Consent Calendar? If not, the machine is open. Senator Gunther. All Senators have voted. The machine is closed and locked.

The vote is 36 to 0. *The Consent Calendar is adopted.*

• • •

EXHIBIT B

(Certificate omitted in printing)

Substitute Senate Bill No. 429

PUBLIC ACT NO. 84-432

AN ACT CONCERNING PRICES AND APPOINTMENT OF DISTRIBUTORSHIP FOR BEER WHOLESALERS.

(Text of Bill omitted in printing)

WEDNESDAY
APRIL 4, 1984

• • •

SENATOR SCHNELLER:

The next two items, Cals. 167 and 168 will be Passed Retaining its Place. Cal. 169 will be taken up.

Page eight — Cal. 170 will be Passed Retaining its Place. 171 will be taken up. 172, *Substitute for Senate Bill No. 429*, I move that it be placed on the *Foot of the Calendar.*

THE CHAIR:

Without objection, so ordered.

SENATOR SCHNELLER:

The remaining two items on the page will be taken up.

Page nine — all items on the page will be taken up with the exception of Cal. 177 and that will be Passed Retaining its Place.

Page ten — 180 will be taken up. 181 will be Passed Retaining its Place. 182 will be taken up. 183 will be Passed Retaining its Place. The last two items will be taken up.

Page eleven — the first item will be Passed Retaining its Place, Cal. 186. All other items on the page will be taken up.

Page twelve — Cal. 192 will be Passed Retaining its Place. The next two items will be taken up. Cal. 195 and 196, the last two items will be Passed Retaining their Places.

Page thirteen — the first four items will be taken up.

Senate Agenda # 8, Monday, May 7, 1984:

BUSINESS FROM THE HOUSE
COMMITTEE ON CONFERENCE

Judiciary. H.B. 5078. AN ACT CONCERNING COMPETENCY TO STAND TRIAL. Committee on Conference Report to Reject House B and Adopt a New Amendment — House Amendment C. LCO 4152, Accepted 5/7.

- - - - -

THE CHAIR:

Are we ready to proceed?

THE CLERK:

Yes, Mr. President. Page 32, under the heading Foot of the Calendar, a matter removed from the Foot, Cal. 172, File 223, *Substitute for Senate bill 429.* AN ACT INCREASING THE AMOUNT OF FINES ACCEPTED IN LIEU OF SUSPENSION OF A LIQUOR PERMIT. Favorable Report of the Committee on General Law. The Clerk has amendments.

THE CHAIR:

Senator Dorr.

SENATOR DORR:

Yes, Mr. President, I move adoption of the Joint Committee's favorable report and passage of the bill.

THE CHAIR:

The Clerk please call the first amendment.

THE CLERK:

The Clerk has *Senate Amendment Schedule A*. LCO 3317, offered by Senator Dorr.

THE CHAIR:

Senator Dorr.

SENATOR DORR:

Yes, Mr. President. That amendment has been Withdrawn.

THE CHAIR:

The amendment is withdrawn.

Call the next amendment.

THE CLERK:

The Clerk has *Senate Amendment Schedule B*. LCO 2850, offered by Senator Murphy.

THE CHAIR:

Senator Dorr.

SENATOR DORR:

Yes, Mr. President, I move adoption of the amendment and ask that the reading be waived.

THE CHAIR:

Without objection, you may proceed.

SENATOR DORR:

Yes, Mr. President. This amendment mandates, by statute, two practices that are the norm here in the State of Connecticut. First, it mandates the continuation of current and historic shipping patterns from breweries to distributors. Second, it requires that breweries prove just and sufficient cause before adding additional distributors in franchise areas. These two measures will prevent out-of-state shippers from bringing punitive measures against in-state distributors.

Mr. President, I move adoption of the amendment.

THE CHAIR:

Do you wish to remark further on the amendment. If not, all those in favor signify by saying Aye. Those opposed Nay. The Ayes have it. **SENATE AMENDMENT B IS ADOPTED.**

Further amendments?

THE CLERK:

Yes, Mr. President. The Clerk has *Senate Amendment Schedule C.* LCO 3923, offered by Senator Streeter.

THE CHAIR:

Senator Streeter.

SENATOR STREETER:

Mr. President, I would like to withdraw that amendment.

THE CHAIR:

Senate Amendment C is withdrawn.

THE CLERK:

No further amendments.

THE CHAIR:

Senator Dorr.

SENATOR DORR:

Yes, Mr. President. Senate Amendment Schedule B is the bill itself. I move adoption of the bill and ask that a roll call be taken.

THE CHAIR:

You are asking for a roll call?

SENATOR DORR:

Yes, this is so this measure can be transmitted to the House.

THE CHAIR:

Do I understand, Senator, that you are going to suspend the rules later for the transmittal of all of these bills, or do you want a separate roll call.

SENATOR SCHNELLER:

Mr. President, through you, a question to the Minority Leader, Senator Robertson. Senator Robertson, I am going to ask for suspension of the rules on this later, so we can put this on the Consent Calendar? (The answer was yes, in the background) Thank you.

THE CHAIR:

Without objection, *this item is placed on the Consent Calendar.*

SENATOR DORR:

Thank you, Mr. President.

THE CLERK:

Page thirty-three, Cal. 467, *Senate Bill No. 613*, File 673. AN ACT CONCERNING THE SALE OF THE WILLIMANTIC ARMORY. This was taken of removed from the Foot of the Calendar. Favorable report of the Committee on

Finance, Revenue and Bonding. The Clerk has an amendment, OFFERED by Senator Johnston.

SENATOR JOHNSTON:

Mr. President, I would move for acceptance of the Joint Committee's favorable report and passage of the bill.

THE CHAIR:

The Clerk please call the amendment.

THE CLERK:

The Clerk has *Senate Amendment Schedule A.* LCO 3398, offered by Senator Johnson.

THE CLERK:

An immediate roll call has been called for in the Senate. Will all senators please take their seats. An immediate roll call has been called for in the Senate. Will all senators please be seated.

THE CHAIR:

Please give your attention to the Clerk who will announce all of those items that have been referred to the Consent Calendar, and at the conclusion, we will take a vote on these items.

THE CLERK:

Page thirty-two, Cal. 172. Page thirty-three, Cal. 467. The Senate will stand at ease. Senator Schneller.

SENATOR SCHNELLER:

Mr. President, are we ready to vote on the Consent Calendar?

THE CHAIR:

Did we call all the items, Mr. Clerk?

THE CLERK:

I believe so, Mr. President.

THE CHAIR:

Are there any corrections or omissions? The machine is open. Please record your vote. Has everyone voted? The machine is closed. The Clerk please tally the vote.

RESULT OF THE VOTE: 36 Yea. 0 Nay. **THE CONSENT CALENDAR IS ADOPTED.**

Senator Schneller.

SENATOR SCHNELLER:

Mr. President, I move for suspension of the rules to send any items that are going down to the House for immediate transmittal to the House.

THE CHAIR:

Without objection, so ordered.

REP. GROPPO: (63rd)

Mr. Speaker, I ask for suspension of the rules so that we can call a non-starred item, on page 6, item 816, Calendar 816.

SPEAKER STOLBERG:

Is there objection to suspension of the rules? Is there objection? Seeing no objection the rules are suspended and the item is before us. Will the Clerk please call it.

CLERK:

Calendar page 6, Calendar No. 816, File No. 223, *Substitute for Senate Bill No. 429*, AN ACT INCREASING THE FINES ACCEPTED IN LIEU OF SUSPENSION OF A LIQUOR PERMIT. (As amended by Senate Amendment Schedule "B"). Favorable Report of the Committee on General Law.

REP. MOSLEY: (72nd)

Mr. Speaker.

SPEAKER STOLBERG:

Rep. Maurice Mosley.

REP. MOSLEY: (72nd)

I move acceptance of the Joint Committee's Favorable Report and passage of the bill, Mr. Speaker.

SPEAKER STOLBERG:

Will you remark?

REP. MOSLEY: (72nd)

Mr. Speaker, the Clerk has an amendment. Senate Amendment "B", LCO No. 2850. I'd like the Clerk to call and I have permission to summarize.

SPEAKER STOLBERG:

The Clerk has an amendment, LCO 2850, Senate Amendment Schedule "B". Will the Clerk please call.

CLERK:

LCO No. 2850, designated *Senate Amendment Schedule "B"*, offered by Senators Murphy and Robertson.

SPEAKER STOLBERG:

Is there objection to summarization? Seeing none, please proceed.

REP. MOSLEY: (72nd)

Mr. Speaker, briefly, this amendment was passed. The Senate unanimously was offered by the leadership in the Senate. Senators Murphy and Robertson. And essentially it does two things Mr. Speaker.

First, it mandates the continuation of current and historical shipping patterns from breweries to distributors.

And, secondly, it requires the breweries, when they are going to put another, add another distributor in the territory, they have to establish just and sufficient cause for doing so. And, I move adoption of the amendment, Mr.***

REP. FARR: (19th)

Mr. Speaker, I recognize the hour is late. Unfortunately we have legislation before us that has not been in our files. No one has had a chance to read or think about the impact. I'm trying to raise some issues here and it appears to me that we have an amendment before us that I don't believe we've fully heard at any point. I think it makes some substantial changes in our law and a question through you to Rep. Mosley, was the issue of requiring a showing of need in order to establish a new distributor ever a subject of a public hearing.

SPEAKER STOLBERG:

Rep. Mosley.

REP. MOSLEY: (72nd)

Through you, Mr. Speaker. The concept which we are talking about right now was discussed in the General Law Committee and was discussed as hearing on affirmation Mr. Speaker, through you.

SPEAKER STOLBERG:

Rep. Farr.

REP. FARR: (19th)

Mr. Speaker, I recognize this is probably going to pass because so many affirmation types of bills have passed this House.

I just point out to you it's another anti-consumer legislation that gives vested rights to certain people in our society and those are distributors. And what you're saying is that we're going to pass state statutes giving some gusted right in distributors that there can't be any competition and everybody can pay higher liquor fees.

And we're going to do that in the name, I guess, of fairness. I don't know who is being fair to whom here, but I think it's a bad amendment and it ought to be rejected.

SPEAKER STOLBERG:

Will you remark further on Sencte "B"? Will you remark further? If not, all those in favor of the amendment please indicate by saying aye.

REPRESENTATIVES:

Aye.

SPEAKER STOLBERG:

All those to the contrary nay.

REPRESENTATIVES:

No.

SPEAKER STOLBERG:

The ayes have it. *The amendment is adopted.*

Will you remark further? Rep. Mosley.

REP. MOSLEY: (72nd)

Mr. Speaker, just briefly on the bill, the bill will allow the Department of Liquor Control Commission, which has discretionary authority now, to accept money in lieu of suspensions. This would collify the statute the statute and will also increase the amount of fines that are accepted in lieu of suspension of liquor permits. I move passage of the bill, Mr. Speaker.

SPEAKER STOLBERG:

Will you remark further on the bill? Will you remark further? If not, will members please be seated. Will staff and guests come to the well of the House. The machine will be opened.

CLERK:

The House of Representatives is now voting by roll. Will the members please return to the Chamber immediately.

The House of Representatives is now voting by roll. Will the members please return to the Chamber immediately.

SPEAKER STOLBERG:

Have all the members voted? Have all the members voted and is your vote properly recorded?

Have all the members voted? Have all the members voted and is your vote properly recorded? If all the members have voted, the machine will be locked and the Clerk will take a tally.

Will the Clerk please announce the tally.

CLERK:

Senate Bill 429, as amended by Senate Amendment Schedule "B".

Total Number Voting	144
Necessary for Passage	73
Those voting Yea	136
Those voting Nay	8
Those absent and not Voting	7

SPEAKER STOLBERG:

The bill is passed. •••

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

NO. H84 816 PCD

AUGUST 30, 1984

BRIEF ON DEFENDANTS MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, MOTION FOR STAY

INTRODUCTION

This action was commenced by the Plaintiffs' (hereinafter Brewers) Complaint filed in this court on July 25, 1984, seeking both a Declaratory Ruling and Injunctive Relief against what the Brewers refer to as the "beer price affirmation provisions" of Connecticut Pub. Act 84-332, Pub. Act 84-432 and Section 30-63a(b) of the Connecticut Liquor Control Act . . ." The Brewers allege that these sections of the Connecticut law are violative of the Constitution of the United States, most particularly the Commerce Clause, Art. I, Sec. 8, cl. 3; and, the Supremacy Clause, Art. VI, cl. 2, through a statute of the United States regulating commerce, Section 1 of the Sherman Act, 15 U.S.C. Sec. 1.

As is evident from both the allegations of the Complaint (Complaint, paragraph 2) and the Affidavit of the Liquor Control Commission (Affidavit, par. 5b) it was the Connecticut General Assembly's clear intention and purpose to enact that legislation which would comply with the mandate of the Second Circuit Court in *U.S. Brewers Association, Inc. v. Healy*, 629 F.2nd 275 (2nd Cir., 1982) aff'd ____ U.S. ____, 104 S.Ct. 692 78 L.Ed.2d 248 (1983).

Beer Price Affirmation System

A. The previous law

Any discussion of the present Connecticut system must begin with an understanding of the beer affirmation system as it existed under the Connecticut legislative enactments of 1981. That system is most cogently and completely described in the attachments to Defendants' 9(c) Statement consisting of the U.S. District Court decision of February 16, 1982, Blumenfeld, J., and the U.S. Circuit Court of Appeals decision of November 1, 1982, Timbers, Van Graafeiland, and Kearse, J's. However, the former system may be briefly described as follows: Connecticut has a three-tier system of liquor distribution: out-of-state shippers (Brewers); Connecticut wholesalers; Connecticut retailers. Each of the above-noted sellers must hold a valid Connecticut license to sell alcoholic beverages to the tier below and, of course, in the case of the retailer, to permit sales to consumers.

When the Connecticut General Assembly passed Public Act 81-294, it thereby imposed the following structure upon the industry. The Brewers were compelled to "post" the prices for their particular product before the 13th day of the month, which price would be effective and controlling for the next succeeding month. Moreover, the prices could not change during said month. Other provisions of that old law compelled the Brewers, when arriving at the price which they were to post in Connecticut, to determine the lowest price at which the identical product *would be* offered for sale in a surrounding state (i.e., New York, Massachusetts and Rhode Island) during the succeeding month. The Brewers were also compelled to file a sworn affidavit that the posted per unit price would be no higher than the price for the corresponding units sold in any state which bordered the State of Connecticut *during the month covered by the posting.* Still another section of the same Public Act rendered it illegal for a Brewer to sell beer to a wholesaler at a unit price higher than the lowest price it was *then* charging another wholesaler for the same unit in any state bordering the State of Connecticut.

This system was vigorously attacked by the Brewers on the grounds that the Connecticut legislation was unconstitutional as violative of the Supremacy Clause and the Commerce Clause of the United States Constitution and they also presented claims of unconstitutionality pursuant to the Due Process Clause. The U.S. District Court, in an expansive and well-reasoned decision, upheld the constitutionality of the beer price affirmation provisions and disposed of all constitutional claims presented. *U.S. Brewers Ass'n v. Healy*, 532 F.Supp. 1312 (D. Conn., 1982). On appeal, the U.S. Court of Appeals for the Second Circuit determined that the Connecticut Beer Price Affirmation System was unconstitutional as violative of the Commerce Clause, perceiving that the Connecticut Statute had an 'extraterrritoral thrust' inasmuch as it regulated prices in the surrounding states as well as in Connecticut. *U.S. Brewers Ass'n v. Healy*, 692 F.2d 275 (1983). The U.S. Supreme Court affirmed the judgment of the Second Circuit Court without opinion. (Copy of decision attached to Defendants' 9(c) Statement).

B. The amended law

Turning then to the new legislation, Connecticut's 1984 beer affirmation legislation had, as its declared purpose, the intention to meet the constitutional infirmities as perceived by the Second Circuit. (See Complaint, par. 2; Legislative debates attached to Defendants' 9(c) Statement). We must, however, vigorously dispute the following allegation found in the same paragraph 2 of the Complaint: "The revised legislation, however, fails to achieve its stated objective."

We have furnished for this Court, the sworn Affidavit of Chairman Healy and Commissioner Snyder of the Department of Liquor Control of the State of Connecticut. In that Affidavit the Liquor Control Commission, whose power and duty it is under C.G.S. Sec. 30-6 to enforce and interpret the provisions of the Connecticut Liquor Control Act, clearly sets forth that agency's interpretation of the 1984 Public Acts and any impact upon existing Connecticut statutes. Pursuant to

that interpretation, the new beer price affirmation provisions, as specifically contrasted to the old system, is as follows:

C.G.S. Sec. 30-63, as amended, (Section 1 of Public Act 84-332) mandates that a Brewer, on a monthly basis, post the per unit price at which it will offer its respective product to a Connecticut wholesaler "for the month following such posting." This price will be the controlling price in Connecticut for the month following such posting. The regulations of the Department of Liquor Control (Sec. 30-6-B4, as amended on January 11, 1984, 45 C.L.J. No. 32, p. 4c, February 7, 1984 (copy attached)), mandate that such price be posted with the Liquor Control Commission on or before the 6th day of the month. Section 3(b) of Public Act 84-332, amended C.G.S. Sec. 30-63(b) of the Connecticut General Statutes, so as to mandate that:

> "[a]t the time of posting . . ., [the brewer] shall file with the Department of Liquor Control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that AT THE TIME OF POSTING the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees [during the period of the posting will be] IS no higher than the lowest price at which each such item of beer is [or will be] sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state [*at any time during the calendar month covered by such posting.*]

The Court will please note that we have reproduced the Public Act as it appears in its Public Act form, which clearly indicates the insertions and deletions effected by the General Assembly, i.e., that portion of the former act deleted appears in brackets; that portion inserted appears in capital letters. Paragraph 35 of the Complaint however, reflects the statute as it will appear after codification by the Legislative Commissioner's Office of the State of Connecticut. (See C.G.S. Sec.

2-56(g). While it is accurate to construct the statute this way, we feel it is essential for the court to focus upon the nature of the changes which are highlighted in the Public Act form. It will not be lost upon this court that the essential changes here make it clear that the affirmation requirement of the Brewer relates to the price *at the moment of posting*, and not, as was required before, as the price "will be" during the period of posting (i.e., the month that follows) (See paragraph 5a of Liquor Commissioners' Affidavit).

Interpretation of the Law

The gravamen of Plaintiffs' Complaiant here is that the Connecticut General Assembly did not effectuate its declared purpose of amending the law so as to conform to the Court of Appeals' decision. They point, again accurately, to the fact that no amendatory language was employed, and no existing language was deleted, from Section 30-63a(b). We cannot but agree that this is literally true. The statute still reads:

> (b) No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer as defined in section 30-1, at a bottle, can or case price, or price per keg, barrel or fractional unit thereof, higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out of-state shipper to any wholesaler in any state bordering this state.
>
> C.G.S. Sec. 30-63a(b)

Standing alone this section purports to concern the sale by the Brewers of a product in Connecticut at a price no lower than the then existing lowest price being charged in a border state. However, we direct this court to the Affidavit of the Liquor Control Commissioners, and specifically, paragraph 5b. As noted in that Affidavit, the Liquor Control Commission

is the agency charged with the enforcement of the Liquor Control Act, C.G.S. Sec. 30-6. Pursuant to that authority, the Liquor Control Commission is empowered and obligated to enforce the provisions of the Liquor Control Act and, by necessary implication, to interpret those same provisions. The Liquor Control Commission has now formally declared that its interpretation of the command of Section 30-63a(b) is *not* as feared by the Brewers. That is, the Liquor Commission has determined that the sale of a particular product to a Connecticut wholesaler by a Brewer, at a price which is at that particular instant in time, higher than the lowest price for the corresponding product in a bordering state is neither illegal under, nor prohibited by, the Connecticut law. The Liquor Commission has declared moreover, that the Brewer need only sell to a Connecticut wholesaler at the 'posted price', and that a sale at such 'posted price', (assuming a proper affirmation at the time of posting) is permissible. That is all that is requested and/or expected.

The Liquor Commission based its interpretation upon the expressed intention of the General Assembly as found in the words of Senator Dorr:

> "This Bill, Mr. President, would alter existing price affirmation requirements and would include wine in the new price posting affirmation system. Prices on all alcoholic beverages sold in Connecticut would be posted on a monthly basis with the Division of Liquor Control but any affirmation as it reflects prices charged anywhere else in the country would apply only to the price existing at the time of posting and not for the entire month after as is currently required, Mr. President.
>
> This Bill would specifically allow manufacturers and shippers to change wholesale prices on (sic) all other states and the District of Columbia at any time during the calendar month covered by the Connecticut posting."
>
> 1984 Conn. Gen. Assembly, Sen. Proc. (April 18, 1984) p. 1278. See Legislative Debates, Defendants' 9(c) Statement, Exhibit A.

Indeed the Connecticut Liquor Commissioners, in their Affidavit at Par. 5(c), point to the existence of the *new* language of Sec. 3(e) of P.A. 84-332 as compelling the conclusion that Brewers *must* remain free, during the period of posting to raise or lower their prices in adjoining states.

> (e) THIS SECTION SHALL NOT PROHIBIT A MANUFACTURER OR OUT-OF-STATE SHIPPER PERMITTEE OR THE AUTHORIZED REPRESENTATIVE OF A MANUFACTURER FROM CHANGING PRICES TO ANY WHOLESALER IN ANY OTHER STATE OF THE UNITED STATES OR IN THE DISTRICT OF COLUMBIA, OR TO ANY STATE OR AGENCY OR A STATE WHICH OWNS AND OPERATES RETAIL LIQUOR OUTLETS AT ANY TIME DURING THE CALENDAR MONTH COVERED BY SUCH POSTING.
>
> P.A. 84-332, Sec. 3(c).

Quite clearly the Liquor Commission in the State of Connecticut is a state agency as defined in Section 4-176 of the Conn. Gen. Stat. Just as clearly, the Liquor Control Commission:

> " . . . may, in its discretion, issue declaratory rulings as to the applicability of any statutory provision or of any regulation or order of the agency. . . "
>
> Sec. 4-176, C.G.S.

The Liquor Commission, pursuant to this authority, in the affidavit filed herewith, and, therein by its Declaratory Ruling, interprets the applicability of these statutory provisions. We submit, it has, in so doing, correctly determined a matter of state law. It has, in so doing, followed the dictates of the canon of statutory construction, time and again ratified by the Connecticut Supreme Court, which instructs that an

agency or court in the State of Connecticut, must, whensoever possible, interpret a statute in a manner which renders such statute constitutional:

> "We have consistently held that every presumption should be made in favor of the constitutionality of a statute, and it will be sustained unless its invalidity is established beyond a reasonable doubt. *State v. Warren*, 169 Conn. 207, 217, 363 A.2d 91 (1975); *Lublin v. Brown*, 165 Conn. 212, 219, 362 A.2d 769 (1975); *Wilson v. Connecticut Product Development Corporation*, 167 Conn. 111, 114 355 A.2d (1974). Moreover, we have asserted that, where a statute permits two constructions, one valid and the other invalid as unconstitutional, the valid construction should be adopted, *even where it is not the obvious one. Lublin v. Brown*, supra, 219-20."
>
> *Engle v. Personnel Appeal Board*, 175 Conn. 127, 134, 394 A.2d 731 (1978). (emphasis added)
>
> See also: *Grega v. Warden*, 178 Conn. 207, 423 A.2d 813 (1979); *Kellems v. Brown*, 163 Conn. 478, 313 A.2d 53, appeal dismissed, 409 U.S. 1099.

The Connecticut General Assembly and the Liquor Commission were, and are, mindful of the decision of the U.S. District Court of Appeals in, *U.S. Brewers Association, Inc. v. Healy*, supra, and the unconstitutional extraterritorial thrust of the former Connecticut beer price affirmation provisions. The General Assembly clearly intended to meet those stated objections to the law (see Complaint, par. 2; Legislative Debates). The Liquor Commission has determined it will not stiffle or thwart that intention in keeping with the principle that,

> "In fact, '[i]t is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if a reliance on that language would defeat the plain purpose of the statute.' "
>
> *Brothers v. First Leasing*, 724 F.2d 789 citing, *Bob Jones University v. U.S.* ___ U.S. ___, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983).

Furthermore, were the Liquor Commissioners to interpret C.G.S. Sec. 30-63a(b) in the literal and strict manner advocated by the Brewers, it would, in effect, be concluding that Section 3(e) of P.A. 332, was a meaningless, superfluous action of the General Assembly. A time honored rule of Connecticut statutory construction precludes such a result. *Harris Data Communications, Inc. v. Heffernan*, 183 Conn. 194, 197 438 A.2d 1178 (1981); *Winchester v. Conn. State Board of Labor Relations*, 175 Conn. 349, 402 A.2d 332 (1978); *Grievance Committee v. Dacey*, 154 Conn 129, 138, 222 A.2d 339 (1966). Indeed, the words of the Connecticut Supreme Court, uttered just this month, seem particularly appropriate in this case:

> "Thus, if the 1981 statute does not apply to existing distributorships, neither did the 1971 enactment. If, as we assume, the purpose of the 1971 statute was to regulate what the legislature perceived as abuses in the liquor industry, then it would have labored mightily to have produced so inconsequential a piece of legislation, one that would have had no effect on existing distributorships of whatever duration and would have permitted a few manufacturers or out-of-state shippers to dominate the state liquor industry. Unless the statutory language expressly requires it we cannot attribute to the legislature an intent to produce an unworkable statute.
>
> *Schieffelin & Co. v. Department of Liquor Control*, 194 Conn. 165, 176, ____ A.2d ____ (1984).

Thus the Liquor Control Commission correctly refuses to conclude that the General Assembly "labored mightily" to enact a beer affirmation system compatible with *Healy*, supra, and yet "produced so inconsequential (or ineffective) a piece of legislation."

Constitutionality of the Amended Law under the Commerce Clause

We respectfully submit that the *new* beer affirmation system as designed and intended by the General Assembly, and as it is to be *enforced* by the Department of Liquor Control, fully comports with the well established Commerce Clause standards established by the U.S. Supreme Court in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966).

We direct this court's attention to the cogent analysis of the 'old' Connecticut beer affirmation statutes embodied in Judge Blumenfeld's decision in *U.S. Brewers Ass'n v. Healy*, 532 F.Supp. 1315. Clearly, that analysis remains relevant and persuasive since the new system retains most of the original components, save that aspect thereof which, in the opinion of the U.S. Court of Appeals, gave the statutes a constitutionally impermissible extraterritorial thrust.

Judge Blumenfeld's opinion, after discussing the general principles applicable to any type of Commerce Clause analysis, reached the following conclusions:

> The Connecticut system was not "protectionist" in purpose since there are no Connecticut Brewers to serve as the ignoble beneficiaries of blatant discrimination nor did that statute seek 'lower' or 'better' prices for Connecticut wholesalers/retailers, vis-a-vis out-of-state wholesalers/retailers, but simply equal prices. 532 F.Supp. 1312, 1323-1324.
>
> The Connecticut system did not foster a discriminatory effect upon any of these parties for essentially the same reasons, i.e., the absence of any Connecticut Brewers and the achievement of price parity rather than lower price supremacy. 532 F.Supp. 1312, 1324.
>
> The Connecticut system did not create a structure which imposed an impermissible burden on interstate commerce:

> The plaintiffs argue quite forcefully that the statute's effect on their marketing practices will be so disruptive as to constitute a burden on interstate commerce. They point to several specific aspects of their marketing practices which will have to be altered in order to comply with the Connecticut statute. In addition, plaintiffs argue that the price affirmation statute will have "dislocating effects on competition in the bordering states," constituting a substantial burden on commerce.
>
> 532 F.Supp. 1312, 1325 footnotes omitted).

A review of the allegations of the instant complaint, contrasted with the above excellent synopsis of the brewers' former claims results inevitably in the conclusion that the claims are virtually identical. Hence, the conclusion of the District Court should, we submit, remain firm and unchanging:

> While the beer price affirmation statute may interfere with the 'natural functioning of the interstate market' and force changes in the 'particular structure or methods of operation' in the beer market, *Exxon v. Maryland*, makes it clear that this alone does not constitute an impermissible burden on interstate commerce.
>
> • • •
>
> The basic beer pricing decisions which underlie the brewer's competitive strategies is left to them, and *each* may strike the balance it chooses. I therefore hold that the beer price affirmation statute does not place an impermissible burden on the movement of beer in interstate commerce.
>
> 532 F.Supp. 1312, 1337

The Court of Appeals did not disagree with any of these conclusions of the District Court. On the contrary, we submit that any fair reading of its decision leads inevitably to the conclusion that the Court of Appeals concurred fully in the analysis. Else, why would the court devote four comprehensive footnotes in its decision to a re-iteration of the lower court reasoning and conclusions? See 692 F.2d 275, 281 n. 12, 282 ns. 13–15. Significantly, the court could, with an eye to judicial efficiency, simply have indicated the non-necessity of reviewing any portion of the District Court's decision (and thereby signify its reluctance?), for as it did say and find:

> . . . . the beer price affirmation provisions on their face [constitute] an impermissible burden on commerce, for it is evident that the Connecticut statute seeks to regulate prices not just in Connecticut but in its surrounding states as well."
>
> 692 F.2d 275, 282

We submit, that the U.S. Court of Appeals devotion of a considerable portion of its decision to the findings and conclusions of the District Court constitutes, at a minimum, an implicit recognition of the legal soundness and accuracy of that decision. Thus, the Court of Appeals very precisely isolated the only constitutional infirmity which it found to exist:

> But the extraterritorial thrust of the main beer price affirmation provisions, §§ 30-63a(b) and 30-63b(b), . . . , is plain, for those sections *prevent a brewer from selling below the Connecticut wholesaler price* to any wholesaler in any neighboring state. In other words, these sections tell a brewer that for any given month when it sells beer to a wholesaler in Massachusetts, New York, or Rhode Island, it may not do so at a price lower than that it has *previously announced* it will charge to Connecticut wholesalers.
>
> 692 F.2d 275, 282

As we hope we have previously demonstrated in this brief, the new Connecticut law does not, (and the Liquor Control Commission so interprets the new law) "prevent a brewer from selling below the Connecticut wholesale price." Indeed that Connecticut wholesale price is the price which the brewer had previously set and used during the prior month in one of the surrounding states, since the new C.G.S. Sec. 30-a(b) quite clearly insists only that the Brewer affirm that the 'posted price' is the lowest charged at that precise moment in time (i.e., at the time of the posting) and, not, as was the case under the old affirmation law, during the entire effective period of posting. Hence, the Connecticut General Assembly, clearly deleted the offensive and '*thrusting*' phrases: "during the period of the posting will be"; "or will be"; and "at any time during the calendar month covered by such posting". (See P.A. 84-332, Sec. 3(b), and the bracketed phrases therein, which signify deletions).

Of perhaps the greatest significance we again draw the court's attention to the complete text of Sec. 3(e) of P.A. 84-332:

> (e) THIS SECTION SHALL NOT PROHIBIT A MANUFACTURER OR OUT-OF-STATE SHIPPER PERMITTEE OR THE AUTHORIZED REPRESENTATIVE OF A MANUFACTURER FROM CHANGING PRICES TO ANY WHOLESALER IN ANY OTHER STATE OF THE UNITED STATES OR IN THE DISTRICT OF COLUMBIA, OR TO ANY STATE OR AGENCY OF A STATE WHICH OWNS AND OPERATES RETAIL LIQUOR OUTLETS AT ANY TIME DURING THE CALENDAR MONTH COVERED BY SUCH POSTING.

We respectfully remind this court that each and every of the foregoing words in Section 3(e) constitutes new and added language inserted by the Connecticut General Assembly to meet the objections articulated by the Court of Appeals. It thus belies logic to assert that the Brewers cannot change prices in border states during the period of posting.

Thus we submit that the new affirmation provisions of the Connecticut law constitute a virtual replica of the New York system which was found to be in compliance with the Constitution by the U.S. Supreme Court:

> We need not now decide whether the mode of liquor regulation chosen by the State in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause. See *Baldwin v. G.A.F. Seelig*, 294 U.S. 511. No such situation is presented in this case. The mere fact that 9 is geared to appellants' pricing policies in other States is not sufficient to invalidate the statute. As part of its regulatory scheme for the sale of liquor, New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country.
>
> *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 42-43 (1966).

The Court of Appeals found our reliance upon *Seagram* to be 'misplaced', when asserted as supporting the former affirmation provisions, 692 F.2d 275, 283. However, the following language of that same decision makes it convincingly clear that such reliance, *now*, is not only appropriate but, we submit, conclusive:

> In *Seagram*, the Court considered a New York law that required liquor manufacturers to post monthly price schedules for sales of liquor in New York, with "an affirmation that 'the bottle and case price of liquor is no higher than the lowest price' at which sales were made anywhere in the United States during the *preceding month*." 384 U.S. at 39-40 (Emphasis added). The New York Statute differed significantly from the Connecticut statute, because, unlike Connecticut's beer price affirmation

> provisions which control brewers' future conduct in the states surrounding Connecticut, the New York law in *Seagram* merely required that New York prices reflect what had been charged elsewhere in the past. Thus, the New York law, although it affected the prices that manufacturers would choose to set in other states, d[i]d not limit the freedom of a manufacturer at any given time to raise or lower prices in any other state.
>
> Given the latitude allowed a state under the Twenty-first Amendment to regulate the sale of liquor within its own borders, the holding in *Seagram* might well validate beer price regulation less intrusive than the present Connecticut statute, such as a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set in the surrounding states, *see* 384 U.S. at 43–45, leaving those out-of-state prices unregulated by Connecticut. But nothing in *Seagram* purports to rule that a state may achieve its goal of price-parity by the far more drastic, and clearly excessive, method of controlling the minimum prices at which liquor may be sold outside its own territory.
>
> 692 F.2d 275, 282

The new Connecticut law 'merely requires that Connecticut prices reflect what had been charged elsewhere in the past.' The new Connecticut law 'does not limit the freedom of a brewer at any given time to raise or lower prices in any other state'. Indeed, the new Connecticut law has not gone as far as the Court of Appeals said it might since it has not imposed a 'requirement that a brewer set its Connecticut prices at the lowest level it simultaneously chooses to sell in the surrounding states.'

Simply put, the new Connecticut law meets all established constitutional criteria and must be permitted to operate upon the beer industry *within* the State of Connecticut.

Constitutionality of the Amended Law under the Sherman Act and Supremacy Clause

Count IV of the Complaint, pars. 53–56, alleges that Connecticut's beer price affirmation provisions, in conjunction with Connecticut's price posting requirement, violate Section 1 of the Sherman Act, 15 U.S.C. Sec. 1, and thus contravene the Supremacy Clause of the Constitution of the United States, Art. VI, cl. 2.

This *precise* issue was raised and decided adversely to the plaintiffs in *United States Brewers Ass'n. Inc. v. Healy*, 532 F.Supp. 1312, 1329–30 (D. Conn. 1982), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982). The Second Circuit did not reach the Supremacy Clause issue, 692 F.2d at 278.

Simply stated, neither the affirmation nor the price posting requirements permanently condone, authorize, require or compel an *agreement* between or among two or more private parties. Such an agreement is an essential prerequisite to finding a violation of Section 1 of the Sherman Act.

There exists no material differences, for purposes of Sherman Act/Supremacy Clause analysis, between the statutes at issue in *Healy* and the instant action. Judge Blumenfeld stated:

> It is also clear that the beer price affirmation statute requires only unilateral action by each brewer and importer. It does not require conduct which the antitrust laws forbid, and does not exert "irresistible economic pressure" on the plaintiffs to violate the Sherman Act. It follows that the statute does not implicate the Supremacy Clause, and, therefore, plaintiffs' argument must be rejected.

532 F.Supp. at 1330. See also, *Morgan v. Division of Liquor Control*, 664 F.2d 353, 355 (2d Cir. 1981) *aff'g sub nom. Serlin Wine & Spirits Merchants, Inc. v. Healy*, 512 F. Supp. 936 (D. Conn. 1981).

For the foregoing reasons, the Defendants Motion for Summary Judgment with respect to Count IV of Plaintiffs' Complaint should be granted.

Abstention

Should this court determine either that it is not bound by the Liquor Commission's interpretation of the new Connecticut affirmation law or finds itself in disagreement with that interpretation, we respectfully submit that the court should invoke the doctrine of abstention and refuse to entertain this action with respect to the Commerce Clause issues only.

The U.S. Supreme Court has repeatedly articulated its position regarding when and under what circumstances, a federal court should properly invoke the doctrine of abstention. *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Colorado River Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1975).

The Second Circuit, when called upon to construe this *Pullman* abstention rule, has established a three-fold test which must be satisfied before a federal court should refuse jurisdiction:

> [1] the state statute [must] be unclear or the issue of state law [must] be uncertain
>
> ; [2] the resolution of the federal issue [must] depend upon the interpretation to be given to the state law, . . . and
>
> ; [3] the state law [must] be susceptible of an interpretation that would avoid or modify the federal constitutional issue.
>
> *McReamond v. Wilson*, 533 F.2d 757, 761 (2d Cir., 1976).

Assuming unacceptance of the Liquor Commission interpretation, then the state statute is 'unclear' or 'uncertain'. It is certainly obvious that this case, and its Commerce Clause implications, hinges on the effect of the Connecticut Legislature's 1984 amendments, an issue of statutory construction of first impression and, clearly a matter of "interpretation to be given to the state law. Finally, the Liquor Commission's judgment shows, if nothing else, that the state statute is "susceptible of an interpretation that would avoid or modify the federal constitutional issue." The latter is especially true in light of the Complaint herein which clearly attacks the statute as failing to achieve its stated objective, i.e., to conform to *U.S. Brewers Association, Inc. v. Healy*, supra.

This Complaint is founded solely on a reading of state law which is repugnant to the reading given by the very agency charged with its enforcement. Since that reading is the issue, then we submit, the courts of the State of Connecticut become the only appropriate forum for adjudication. Moreover, since the Liquor Commission shall enforce the affirmation laws consistent with its interpretation, then the Brewers simply are not at risk pending state court adjudication. (Incidentally we note that the Brewers, because of the Declaratory Ruling issued by the Commission, have immediately available to them, recourse to the Courts via C.G.S. Sec. 4-175 and 4-176).

We are constrained to observe that the foregoing argument regarding the doctrine of abstention is confined to the 'Commerce Clause' aspect of this litigation. We have hereinbefore presented our views concerning the 'Supremacy Clause' issues. Suffice it to say, we do not advocate that this court 'abstain' regarding the antitrust allegations, but rather assert that summary judgment may be rendered thereupon.

CONCLUSION

For all the foregoing reasons, we urge this court to render Summary Judgment for the Defendants.

In the alternative, we seek Summary Judgment for the Defendants on the Sherman Act/Supremacy Clause issue and urge the court to stay action on the Commerce Clause issue until the Connecticut Supreme Court renders judgment on the correct interpretation of the statute involved, which would obviate this constitutional issue.

Respectfully submitted,

THE DEFENDANTS
JOHN F. HEALY, ET AL.

JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

BY /s/ Richard M. Sheridan

Richard M. Sheridan
Assistant Attorney General
555 Russell Road
P.O. Box 11424
Newington, Conn. 06111
Tel: 566-7570

BY /s/ Robert F. Vacchelli/gmb

Robert F. Vacchelli
Assistant Attorney General
555 Russell Road
P.O. Box 11424
Newington, Conn. 06111
Tel: 566-7570

BY /s/ R. Langer /s/ LFM

Robert M. Langer
Assistant Attorney General
30 Trinity Street
Hartford, Conn. 06115
Tel: 566-5374

[Certificate of Service omitted in printing]

[Attachments omitted in printing]

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 17, 1983

Mr. Richard M. Sheridan
555 Russell Road
P.O. Box 11424
Newington, CT 06111

Re: John F. Healy, et al., v.
United States Brewers Association, Inc., et al.
No. 82-1493

Dear Mr. Sheridan:

The Court today entered the following order in the above entitled case:

The judgment is affirmed. Justice White, Justice Rehnquist and Justice O'Connor would note probable jurisdiction and set the case for oral argument. Justice Powell took part in the consideration or decision of this case.

Very truly yours,

Alexander L. Stevas, Clerk

/s/ Alexander L. Stevas

DEPARTMENT OF LIQUOR CONTROL

Permits for the Manufacture and Sale of Alcoholic Beverages

Section 1: Section 30-6-A3 of the Regulations of Connecticut State Agencies is amended to read as follows:

Sec. 30-6-A3. Renewal applications

Every renewal application, accompanied by the proper fee in the form of a certified check, postal money order or bank check, shall be filed with the department at least twenty-one days prior to the expiration date of the existing permit. Every renewal application for an on-premises consumption permit, except airline, boat and railroad permit shall be accompanied by: approval from the local fire marshall, and a notarized copy of the license from the commission on special revenue if the permit is provided for by sec. 30-33b of the general statutes. Applicants for renewal permits shall submit photographs as indicated in section 30-6-A1 only if the department determines that such are necessary to examine and document whether the premises is being operated in violation of the liquor control act or the regulations of the department.

Statement of Purpose: To delete requirement that druggist proprietors submit certificate of fitness from the pharmacy commission in coordination with the deletion of this requirement from the statutes by Public Act 82-332, Sec. 8, and to delete the requirement that all renewal applicants submit photographs. The later provision is changed to require such photographs only if the Department finds it necessary, thus bringing the regulation into conformity with modern Department practices, and eliminating an additional source of expense for those licensed by the Department.

Section 2: Section 30-6-B4 of the Regulations of Connecticut State Agencies is amended to read as follows:

Sec. 30-6-B4. Out-of-state shipper price lists to be filed

(a) Every out-of-state shipper permittee shall, annually on or before the sixth day of January, file with the department of liquor control, on forms prescribed by the department, one copy of a complete schedule, with each page of such schedule numbered in numerical order, duly verified by the permittee and attested by the backer, if an individual, or if the backer is a corporation, by an officer of such corporation, of all alcoholic liquors offered for sale in Connecticut, which shall contain with respect to each item: (1) The type of beverage and brand name; (2) the size of the container; (3) the age or per cent and type of neutral spirits; (4) the proof; (5) the number of bottles per case; (6) the bottle and case price. The following information shall be submitted by out-of-state shipper beer only permittees: (1) The type of beverage; (2) the size of the container (barrel, half-barrel, quarter-barrel); (3) the number and size of bottles per case; (4) the container price and case price. At the same time that these schedules are mailed to the department, a copy shall be forwarded to each wholesaler licensed by the department to distribute those products for which the schedule is intended.

(b) Except in the case of still wines and sparkling wines, the case price shall be individual for each item and not in combination with another item. Schedules on multiple packages of still wines and sparkling wines shall contain the bottle price for each item and not in combination with another item. Schedules on multiple packages of still wines and sparkling wines shall contain the bottle price for each item contained in the multiple package, the unit price, and the case price. The bottle price posted in such multiple package case must be the same as the bottle price posted in a case containing the one type and brand of wine. The price set forth therein shall become effective on the first day of the calendar month following the effective filing date thereof and, unless withdrawn or amended, shall be considered refiled and effective each month until the filing date of the next complete schedule. All items shall be bona fide offering of the items set forth in the

list. Price changes and prices on new items may be filed on supplemental price schedules, which schedules shall be filed on the sixth day of any intervening month, and prices on such supplemental schedules shall become effective on the first day of the month following the effective filing date thereof. When filing supplemental price lists showing amended prices, one copy of the whole numbered page on which the original prices appeared shall be filed. One copy of such supplemental price list shall be filed, with a copy to the wholesaler licensed to distribute the product.

(c) Except in cases where an obvious typographical error has been made, no changes, corrections or additions will be considered after the effective filing date. The effective price on any item shall be the price posted on the latest schedule on file on which that particular item appears.

(d) No out-of-state shipper may ship, transport, sell or offer for sale in Connecticut any brand of alcoholic liquor which does not appear on his price schedule.

(e) A violation of any of the provisions of this section shall be punishable by suspension or revocation.

Statement of Purpose: To require shippers to post their prices to wholesalers by the sixth day of each month, instead of by the thirteenth day as previously required. The additional time is needed because additional, time consuming procedures added by P.A. 81-294, Sec. 10 make it difficult to meet existing regulatory and statutory deadlines. The contemporaneous mailing to the affected wholesalers will afford them more time to comply with the requirements of this Public Act.

Section 3: Section 30-6-B7 of the Regulations of Connecticut State Agencies is amended to read as follows:

Sec. 30-6-B7. Consignments; return of goods; authorized distributors

No out-of-state shipper permittee shall sell alcoholic liquors on consignment. No manufacturer, wholesaler or out-of-state shipper permittee shall take back any merchandise once sold, billed, shipped, delivered or received by any permittee unless such transaction has been approved by the department. A full and complete explanation of all circumstances shall accompany any request to take back merchandise. Each manufacturer and out-of-state shipper permittee shall file with the department a list of his authorized distributors, setting forth the brands and also the exact geographical area in which the distributor or wholesaler shall be authorized to sell, and shall also file a certificate from the wholesaler to the effect tht he is, in fact, servicing the area designated and no other area for the brand or brands for which he has been appointed as distributor. Where a wholesaler has held a distributorship for less than six months, no change on the list of authorized distributors or wholesalers of a manufacturer or out-of-state shipper shall be made except after ninety days' notice by registered mail to all such authorized distributors or wholesalers affected by such change which appear on the list of the particular manufacturer or out-of-state shipper as recorded in the office of the department of liquor control, and except after ninety days' like notice to and approval by the department. Such changes may be made without waiting the ninety days with the approval of the department where waivers are executed by the distributors or wholesalers concerned, or where the geographical area of distribution has not been already allocated to a distributor or wholesaler, or after a hearing has been held, upon presentation of sufficient evidence of any violation of the liquor control act or regulations of the department, or evidence of any other act detrimental to the orderly conduct of the business, in which a present authorized distributor or wholesaler has been involved. The notice of change shall indicate that the name of the permittee is to be an additional distributor or wholesaler or, in the case of eliminating the name of a present distributor or

wholesaler, with or without substituting another permittee's name, the notice of the change shall so indicate an "elimination" or "substitution." Geographical areas of distribution shall be submitted either by townships or counties or statewide, and any change in geographical area of distribution shall fully conform to the same essential conditions as required in the notice of change to distributors or wholesalers.

Statement of Purpose: To amend the time limits in the regulation in coordination with changes made by Public Act 81-367.

Section 4: Section 30-6-B12 of the Regulations of Connecticut State Agencies is amended to read as follows:

Sec. 30-6-B12. Manufacturer and wholesaler price lists to be filed

(a) Each manufacturer and wholesaler permittee shall, annually, on or before the twelfth day of December, file with the department of liquor control on forms prescribed by the department one copy of a complete schedule, with each page of such schedule numbered in numerical order, duly verified by the permittee and attested by the backer if an individual or, if the backer is a corporation, by an officer of such corporation, of all alcoholic liquors offered for sale in Connecticut. These lists shall contain with respect to each item: (1) The type of beverage and brand name; (2) the size of the container; (3) the age or per cent and type of neutral spirits; (4) the proof; (5) the number of bottles per case; (6) the bottle price and case price which shall include all customs, duties, federal taxes, state taxes and cost of delivery to the permittee. If a manufacturer or wholesaler sells to another manufacturer or wholesaler, the prices shall be submitted on a separate schedule; (7) the name of the publication or publications the prices will appear in. If not published, the affidavit required by subsection (g) shall be submitted. The following information shall be submitted only by manufacturer and wholesaler beer permittees: (1) The type of beverage; (2) the size of the container

(barrel, half-barrel, quarter-barrel); (3) the number and size of bottles per case; (4) the container price and case price; (5) the name of the publication or publications the prices will appear in. If not published, the affidavit required by subsection (g) shall be submitted.

(b) Except in the case of still wines and sparkling wines, the case price shall be individual for each item and not in combination with another item. Schedules on multiple packages of still wines and sparkling wines shall contain the bottle price for each item contained in the multiple package, the unit price, and the case price. The bottle price posted in such multiple package case must be the same as the bottle price posted in a case containing the one type and brand of wine. The price set forth therein shall become effective on the first day of the calendar month following the effective filing date thereof and, unless withdrawn or amended, shall be considered refiled and effective each month until the filing date of the next complete schedule.

(c) Price changes and prices on new items may be filed on supplemental price schedules, which schedules shall be filed on or before the twelfth day of any month, and the prices on such supplemental schedules shall become effective on the first day of the month following the effective filing date thereof. One copy of such supplemental price schedules showing amended prices shall be filed and only price changes and prices on new items should be listed.

(d) No changes, corrections or additions will be considered after the effective filing date, except in cases where obvious typographical errors have been made and except where otherwise allowed by statute.

(e) No manufacturer or wholesaler permittee may sell or offer for sale any brand of alcoholic liquor which does not appear on his price schedule. All items listed shall be bona fide offerings of the items set forth in the list and each manufacturer and wholesaler, upon request of the department,

shall furnish the department with an inventory of any items that appear on his list. All liquor sold in less than case units at wholesale shall be sold at the per bottle price posted.

(f) All liquors shall be shipped and received by the purchaser in the same period for which the prices set forth in the invoices are in effect.

(g) Each manufacturer and wholesaler shall furnish each permittee customer with a copy of his price schedule, as amended, either by direct mail or by publishing his price schedule in any publication approved by the department of liquor control, provided, in accordance with the method used, the manufacturer, wholesaler or publication shall, on or before the tenth day of the month for which such schedule is effective, submit an affidavit that the provisions of this section have been complied with. If the manufacturer or wholesaler permittee solicits a new account, he shall, before making any sales, present a current price schedule to such account.

(h) A manufacturer or wholesaler posting prices on private labels shall submit those prices on separate sheets distinctly marked "Private Labels."

(i) Each price schedule filed shall contain the statement that the manufacturer or wholesaler is a "present authorized distributor" of all brands on which prices are quoted. If for any reason a manufacturer or wholesaler files prices on any items or brands of which he is not an authorized distributor, such items shall be filed every month even though they remain the same. Such items shall be disposed of within three months and shall not be listed on more than three successive lists without permission of the department and the department will strike from the list those items unless the distributor presents the department with satisfactory reasons for not doing so.

(j) A violation of any of the provisions of this section shall be punishable by suspension or revocation.

Statement of Purpose: To require manufacturers and wholesalers to post their prices to retailers by the twelfth day of each month, instead of by the fifteenth day as previously required. The additional time is needed because additional, time consuming procedures added by P.A. 81-294, Sec. 10 make it difficult or impossible to meet existing regulatory and statutory deadlines.

[Certifications omitted in printing]

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

CIVIL ACTION FILE NO. H 84 816 PCD

SEPTEMBER 19, 1984

MOTION TO INTERVENE AS A DEFENDANT

Wine and Spirits Wholesalers of Connecticut, Inc., as an association, and on behalf of Johnny Barton, Inc., The Brescome Distributors Corporation, Connecticut Distributors, Inc., Eder Bros., Inc., Gallo Wine Merchants, Inc., Allan S. Goodman, Inc., and Hartley & Parker Limited, Inc., its members selling alcoholic liquor in the State of Connecticut, moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in its proposed answer, a copy of which is attached, on the following grounds:

1) The applicant Wine and Spirits Wholesalers of Connecticut, Inc. and its members are subject to the price affirmation provisions of the Connecticut Liquor Control Act and Conn. Pub. Act. 84-332 and Pub. Act 84-432, and claim an interest relating to the property or action which is the subject matter of this suit.

2) The applicant Wine and Spirits Wholesalers of Connecticut, Inc. and its members are engaged in the sale of alcoholic liquor in Connecticut as defined in Section 30-1 of the Connecticut Liquor Control Act of the Connecticut General Statutes. Public Act 84-332, Public Act 84-432, and C.G.S. Section 30-63a(b), the beer price affirmation provisions which are the subject matter of the instant suit, are substantially similar in language and effect to the affirmation provisions

pertaining to alcohol and spirits [See for example C.G.S. Sec. 30-63a(a)] and wine [See for example P.A. 84-332]. Because of the similarity in the provisions, any adverse ruling as to the constitutionality of the beer price affirmation provisions raises a substantial question as to the constitutionality of the alcohol and spirits affirmation provisions and recently enacted wine affirmation provisions.

3) The disposition of this action may as a practical matter impair or impede the applicant's ability to protect its interest, in one or more of the following ways:

A. An adverse disposition as to the constitutionality of the beer provisions may have an adverse effect on future litigation by impairing the applicant's ability to defend the constitutionality of the alcohol and spirits and or newly enacted wine affirmation provisions;

B. The applicant's involvement in this suit may lessen the need for future litigation to protect its interests;

C. The applicant will potentially and actually suffer some economic loss as a result of an adverse ruling as to the constitutionality of the beer affirmation provisions.

In light of the foregoing, the applicants' interest cannot be adequately represented by existing parties.

The applicant therefore seeks to intervene as of right pursuant to F.R.C.P. 24(a).

BAILEY AND WECHSLER

By /s/ Alfred F. Wechsler

(A member of the firm)
One Financial Plaza
Hartford, CT 06103
Tel. No.: (203) 525-9191

By /s/ William A. Wechsler

(A member of the firm)
One Financial Plaza
Hartford, CT 06103
Tel. No.: (203) 525-9191
Attorneys for WINE AND
SPIRITS WHOLESALERS
OF CONNECTICUT, INC.;
JOHNNY BARTON, INC.;
THE BRESCOME
DISTRIBUTORS
CORPORATION:
CONNECTICUT
DISTRIBUTORS, INC.;
EDER BROS., INC.;
GALLO WINE
MERCHANTS, INC.;
ALLAN S. GOODMAN, INC.; AND
HARTLEY AND PARKER
LIMITED., INC.

SO ORDERED:

_____

U.S.D.C. Judge

[Certification of Service omitted in printing]

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

Civil Action File No. H84 816 PCD

ANSWER OF WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.

September 19, 1984

ANSWER

FIRST DEFENSE

Count I

1. The Defendant admits the allegations in paragraphs 1, 8-24, and 29-31.

2. The Defendant denies the allegations in paragraphs 3-7, 39, 41-43, 45 and 46.

3. The Defendant admits the first sentence in paragraph 2 and denies the rest.

4. As to the allegations in the first sentence of paragraph 25, the Defendant does not have sufficient knowledge upon which to form a belief and therefore denies same and leaves Plaintiffs to their proof thereof. The remainder of the paragraph is admitted.

5. The Defendant does not have sufficient knowledge upon which to form a belief as to paragraph 26 and therefore denies same and leaves Plaintiffs to their proof thereof.

6. As to paragraph 27, the Defendant admits the allegations with respect to beer, but notes that any geographic territorial limits within Connecticut imposed on Connecticut wholesalers are established at the choice of the appointing out-of-state shipper pursuant to C.G.S. Sec. 30-63(a) and Sec. 30-6-B7 of the Regulations of Connecticut state agencies.

7. The first three sentences of paragraph 28 are admitted. The remainder of the paragraph is denied.

8. Paragraph 32 is denied inasmuch as it is argumentative and interprets court decisions which speak more accurately for themselves.

9. The last sentence of paragraph 33 is denied. The rest and remainder of the paragraph is admitted.

10. The Defendant essentially admits paragraph 34 except to note that Public Act 84-332 added new language that prices be posted "on a monthly basis" and to note that the law does not employ the term "goods".

11. The Defendant essentially admits the allegations as to paragraph 35 with the exception that the actual language used by the legislature, identifying deletions (in brackets) and additions (in capital letters) is as follows:

> (b) At the time of posting of the bottle, can, keg or barrel and case price required by Section 30-63, AS AMENDED BY SECTION 1 OF THIS ACT, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that AT THE TIME OF POSTING the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees [during the period of the posting will be] IS

no higher than the lowest price at which each such item of beer is [or will be] sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state. [at any time during the calendar month covered by such posting.]

12. That portion of paragraph 36 which reads ". . . which was not amended, and remains in full force and effect . . ." is denied. The rest and remainder of the paragraph is admitted.

13. As to paragraph 37, that portion which reads ". . . Section 3(c) of Pub. Act 84-332, which creates a new Section 30-63(e) of the Liquor Control Act, declares that the affirmation requirement does not prohibit an out-of-state shipper from changing prices in the Border States, . . ." is admitted. The remainder of the paragraph is denied.

14. The last sentence of paragraph 38 is denied. The remainder of the paragraph is admitted.

15. That portion of paragraph 40 which reads, "Finally, the beer price affirmation provisions not only mandate the price at which beer must be sold in Connecticut and below which it cannot be sold in the Border States . . ." is denied. The remainder of the paragraph is admitted.

16. The Defendant's answers to paragraphs 1-43 are hereby incorporated and made Defendant's answer to paragraph 44.

Count II

1. The Defendant's answers to paragraphs 1-46 of Count I are hereby incorporated and made Defendant's answer to paragraph 47.

2. Paragraphs 48 and 49 are denied.

Count III

1. The Defendant's answers to paragraphs 1-49 of Counts I and II are hereby incorporated and made Defendant's answer to paragraph 50.

2. Paragraphs 51 and 52 are denied.

Count IV

1. Paragraphs 53, 54 and 5 are denied.

2. As to the first two sentences of paragraph 55, the Defendant does not have sufficient knowledge upon which to form a belief and therefore denies same and leaves Plaintiffs to their proof thereof. The third sentence is admitted. The remainder of the paragraph is denied.

Irreparable Injury

1. Paragraph 57 is denied.

SECOND DEFENSE

1. The Complaint fails to state a claim against the Defendant upon which relief can be granted.

2. The beer price affirmation provisions, as amended, do not control prices at which beer may be sold outside of the state in violation of the Commerce Clause of the U.S. Constitution.

3. The beer price affirmation provisions, as amended, do not create a statutory mechanism which protects against interstate competition in violation of the Commerce Clause of the U.S. Constitution.

4. The beer price affirmation provisions, as amended, do not create a statutory mechanism which imposes an undue and excessive burden on interstate commerce in violation of the Commerce Clause of the U.S. Constitution.

5. Inasmuch as the beer price affirmation provisions are not yet in effect, this case is in the same posture as the case of *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 US 35 (1966) and should be likewise dismissed.

6. Plaintiffs have presented no facts which demonstrate that the beer price affirmation provisions, as applied to this case, constitute an unlawful burden on interstate commerce.

7. The State interests in this case, embodied in the beer price affirmation provisions as amended by the Connecticut General Assembly pursuant to the Twenty-first Amendment of the U.S. Constitution outweigh the purported interests of the Plaintiffs allegedly protected by the Commerce Clause of the U.S. Constitution.

THIRD DEFENSE

1. The Complaint fails to state a claim against the Defendant upon which relief can be granted.

2. The beer price affirmation provisions, as amended, do not create a statutory mechanism which is violative of the Sherman Act or the Supremacy Clause of the U.S. Constitution.

3. The beer price affirmation provisions as amended, establish a statutory mechanism which is immune from the Sherman Act under the State Action Immunity Doctrine, also referred to as the *Parker v. Brown* Doctrine.

FOURTH DEFENSE

1. The Complaint fails to state a claim against the Defendant upon which relief can be granted.

2. The beer price affirmation provisions, as amended and as interpreted by the Connecticut Department of Liquor Control, correct the deficiencies which caused the former law to be held unconstitutional in *U.S. Brewers Ass'n v. Healy,* 692 F.2d 275 (2nd Cir., 1982), aff'd 104 S.Ct. 265 (1983).

FIFTH DEFENSE

1. In the alternative, the court should stay action in this case with respect to the Commerce Clause under the doctrine of abstention since the case presents a question of statutory interpretation of first impression arising under the Connecticut Liquor Control Act which should be resolved in the State Supreme Court, and the resolution of which would obviate this constitutional question.

Respectfully submitted,

BAILEY AND WECHSLER

By /s/ Alfred F. Wechsler

(A Member of the Firm)
One Financial Plaza
Hartford, CT 06103
Tel. No.: (203) 525-9191

By /s/ William A. Wechsler

(A Member of the Firm)
One Financial Plaza
Hartford, CT 06103
Tel. No.: (203) 525-9191

Attorneys for WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.; JOHNNY BARTON, INC.; THE BRESCOME DISTRIBUTORS CORPORATION; CONNECTICUT DISTRIBUTORS, INC.; EDER BROS., INC.; GALLO WINE MERCHANTS, INC.; ALLAN S. GOODMAN, INC.; AND HARTLEY AND PARKER LIMITED., INC.

[Certification of Service omitted in printing]

APPENDIX J

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

Civil Action File No. H 84 816 PCD

MEMORANDUM IN SUPPORT OF DEFENDANTS MOTION FOR SUMMARY JUDGMENT

FEBRUARY 13, 1985

BRIEF SUPPORTING DEFENDANTS MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, MOTION FOR STAY

INTRODUCTION

This memorandum is submitted in support of Defendants Motion for Summary Judgment. Defendants are John F. Healy and David L. Snyder, Commissioners of the Connecticut Department of Liquor Control who are charged with the responsibility of enforcing the provision of the Connecticut Liquor Control Act, Connecticut General Statutes Section 30-1 *et seq.*, and Charles W. Kasmer, Secretary of the Connecticut Department of Liquor Control who administers many of the day-to-day affairs of the Department. Intervenor-Defendants are the Wine and Spirit Wholesalers of Connecticut, Inc., an association of companies that sell alcoholic liquor in the State of Connecticut. Plaintiffs are the U.S. Brewers Association, Inc., an association of companies that brew beer in the United States or that import beer for sale in the United States (hereinafter Brewers).

The beer price affirmation provisions of the Liquor Control Act, Connecticut General Statutes Section 30-63a(b),

30-63b(b) and 30-63c(b), were first enacted by the Connecticut General Assembly in 1981 in Public Act 81-294. In 1984, the Connecticut General Assembly amended the beer price affirmation provisions in Public Act 84-332 and Public Act 84-432. The declared purpose and ultimate result of Public Act 84-332 was to conform the beer price affirmation provisions to the Appellate decision in *U.S. Brewers Association v. Healy,* 692 F.2d 275 (2d Cir. 1982), affirmed with no opinion ____ U.S. ____, 104 S. Ct. 265, 78 L.Ed. 2d 248 (1983). The Commissioners of the Department of Liquor Control by affidavit and Declaratory Ruling issued pursuant to Connecticut General Statutes 4-176, have interpreted the beer price affirmation provisions to conform to the Appellate decision in *U.S. Brewers Association v. Healy, supra.* Public Acts 84-332, 84-432 and Connecticut General Statute Section 30-63a(b) were enacted pursuant to the Twenty-first Amendment to the U.S. Constitution.

This immediate action was commenced by Plaintiff's on July 25, 1984 seeking both a Declaratory Ruling and Injunctive Relief against the "beer price affirmation provisions" of Connecticut Public Act 84-332, Public Act 84-432 and Section 30-63a(b) of the Connecticut Liquor Control Act. Defendants moved for Summary Judgment on August 30, 1984 based on the fact that there is no general issue of material fact concerning the constitutionality of Public Act 84-332, Public Act 84-432, and Connecticut General Statutes Section 30-63a(b) as interpreted by the Connecticut Liquor Control Commission, and Defendants alternatively moved for a Motion For Stay, Intervenor-Defendant hereby incorporates by reference the brief of Defendants in support of their motion for Summary Judgment dated August 30, 1984.

THE AMENDED LAW IS CONSTITUTIONAL UNDER THE COMMERCE CLAUSE

Section 30-63b(b), as amended provides that, **at the time of posting,** the price being affirmed "is no higher than the lowest price at which each such item of beer is sold, offered for

sale, shipped, transported or delivered" to wholesalers in the border states. Therefore, the law points to a single moment in time at which Brewers must affirm that the price they are offering to sell their product in Connecticut is no higher than the lowest price in any of the border states. There is no language to suggest that the affirmation has a future tense, or that the affirmation is in any way prospective. The Connecticut statutes removed the words "or will be" and the phrase "at any time during the calendar month covered by such posting" which were part of the pre-existing law. In fact, Section 30-63b(e), which was added by Public Act 84-332, specifically states that "[t]his section shall not prohibit a manufacturer or out-of-state shipper permittee . . . from changing prices to any wholesaler in any other state . . ." The Brewers are free to raise or lower their prices as soon as their price has been posted in Connecticut.

In *Seagram & Sons v. Hostetter,* 384 U.S. 35 (1965) the Supreme Court upheld a New York Posting and Affirmation Statute which required that the monthly price schedules for sales to wholesalers and retailers filed with the State Liquor Authority be accompanied by an affirmation that 'the bottle and case price of liquor . . . is no higher than the lowest price" at which sales were made anywhere in the United States during the preceding month.' *Id.* at 39-40.

In upholding the constitutionality of the New York law, the Court noted that the case concerned liquor "destined for use, distribution, or consumption in the State of New York," *Id.* at 42, and that in that situation "the Twenty-First Amendment **demands wide latitude** for regulation by the State." *Id.* [emphasis added] Continuing, the Court reasoned that New York could "constitutionally insist" that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country. *Id.* at 43. Holding for the state, the Court added that the Appellants argument that the statutes would have a discriminatory effect on their businesses outside the state were largely "conjecture" and that '[t]he mere fact that state action may have repercussions beyond state

lines is of no judicial significance so long as the action is not within that domain which the constitution forbids.' *Id.* at 43. The *Seagram* case is directly analogous to the facts presented in the case at bar, and should be controlling.

Each of the three states bordering Connecticut has legislation requiring wholesalers in those states to sell only to retailers in those states. Because of this, there is in fact no direct competition between the wholesalers of each state, since they are prohibited by there own state statutes from selling outside of their states.

Realistically, there is no interstate or regional competition in beer sales due to the nature of the three-tier system established independently by Connecticut and its three border states. Since the Brewers have offered no evidence to support their reasoning as to why prices should be substantially lower in the three border states than in Connecticut, or conversely, why they should be much higher in Connecticut than in the border states, it is reasonable for Connecticut to insure that Connecticut wholesalers and retailers be treated equally by receiving the same prices as their neighbors across state lines. Because the Connecticut law allows Brewers to reflect additional shipping and tax costs in determining the affirmed price, there is no valid reason why Brewers for competitive reasons would have to charge more in Connecticut than in the other three border states.

Connecticut does not seek to dictate the prices at which the Brewers offer their products. Connecticut is simply mandating that its wholesalers be placed on an equal footing with wholesalers in the border states, and that they not be singled out to subsidize lower prices charged by Brewers in these border states. This is similar to the mandate which 17 states with state-run liquor retail operations have given to national liquor distillers and importers, see *Seagram, supra.*

It is fundamental economics if Brewers charge artificially low prices in some markets, they will charge comparably

higher prices in other markets in order to achieve targeted profit margins. Recognizing this market price discrimination, Connecticut has sought only to protect its consumers from being charged prices higher than consumers in other states, so that Connecticut consumers will therefore not be in a position of subsidizing the lower prices being charged to consumers in other states.

Moreover, Connecticut has a legitimate state interest in maximizing sales within its own borders in order to increase its tax revenue. Increasingly state revenue is particularly important in Connecticut, where there is no state income tax, and the State must rely on a sales tax and on such taxes as those imposed on alcohol to fund the state budget. Furthermore, highway safety must be considered a unique factor with regards to traveling across state lines to purchase alcoholic beverages. The state has a legitimate interest in trying to curtail buying patterns that might well lead to an increased danger on the highways.

There are some state activities which have been invalid under the Commerce Clause. In *Philadelphia v. New Jersey*, 437 U.S. 617 (1977), the State of New Jersey attempted to prevent out-of-state shippers from depositing their garbage in New Jersey landfills, while granting New Jersey sources of garbage preferential treatment in being admitted to their landfill sites. In order to adjudge a state law infirm under the Commerce Clause, the Court stated that "[w]hat is crucial is the attempt by one state to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Id.* at 628. Connecticut's affirmation law does not **isolate** Connecticut from its border states, but rather insures that the state is treated **in harmony** with those states and that Connecticut is not "isolated" in paying higher prices to subsidize prices charged in the border states. In a similar vein, the Connecticut legislature solely seeks to have its wholesalers, retailers and consumers treated in parity with their counterparts in its neighboring states.

Connecticut's Posting and Affirmation Statutes attempt to protect the economic interests of the Connecticut beer consumer by assuring that the consumer pay a price that is fair and competitive with the prices paid by consumers in the border states. Connecticut's law does not protect in-state industry at the expense of out-of-state industry, because Connecticut has no in-state brewers. Connecticut's legislation treats all Brewers equally, so that no particular Brewer, and no one particular state, is disproportionately affected by these statutes. Connecticut simply places upon all Brewers desiring to sell their products in Connecticut a uniform element of market price competition. If the competition is too stiff, or if profit margins are perceived to be too small, Brewers are free to exercise their business judgment in withdrawing from doing business in the state of Connecticut.

In short, the Commerce Clause does not prohibit a state from enacting reasonable legislation to protect the economic interests of its citizens, even if such legislation incidentally affects interstate commerce:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Id.* at 624, citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

In the final analysis, the Court in *Philadelphia v. New Jersey* reasoned that "[t]he principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable

effects." See also *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 37 (1980).

TWENTY-FIRST AMENDMENT SANCTIONS CONNECTICUT'S POSTING/AFFIRMATION LAWS

The second section of the Twenty-First Amendment provides that, "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The Twenty-First Amendment makes the sale of liquor in any state a privilege bestowed by the state. A state may completely prohibit the sale and consumption of alcoholic beverages within its borders. Moreover, such a prohibition would not violate the commerce clause. *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 330 (1964). Furthermore, the Court has said that it is well-established that a sate has broad power under the Twenty-First Amendment **"to regulate the times, the places and circumstances under which liquor may be sold,"** [emphasis added] *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S. Ct. 2599, 2600 (1981), see also *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939); *California v. LaRue*, 409 U.S. 109 (1972). Furthermore, as the Supreme Court observed in *Craig v. Boren*, 429 U.S. 190 (1976) "[t]his Court's decision . . . [has] confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause." *Id.* at 206.

Since its adoption, the Twenty First Amendment has remained the governing force in granting states the right to regulate the sale of liquor within their borders. As recently as September 1984, Judge Friendly succinctly stated:

> For some of us who were "present at the creation" of the Twenty First Amendment . . . the Twenty First Amendment was designed to end the "noble experiment" by which the Federal government endeavored to control the drinking habits of all

citizens and to place control of alcoholic beverages in the states. Fulfillment of the latter purpose required that, in addition to repealing the Eighteenth Amendment, which was accomplished by § 1, the Amendment should give the states full authority to deal with the subject of intoxicating liquor free from limitations imposed by the Commerce Clause, which had tampered such regulation before the Eighteenth Amendment was adopted. This was accomplished by § 2 of the Twenty First Amendment which provides: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.' *Jack R. Battipaglia and Bacchus Selections, Inc. v. New York State Liquor Authority*, No. 1381 dated September 21, 1984.

THE AMENDED LAW IS CONSTITUTIONAL UNDER THE SHERMAN ACT AND SUPREMACY CLAUSE

Count Four of Plaintiff's Complaint, Paragraphs 53 through 56, alleges that Connecticut's beer price affirmation provisions in conjunction with Connecticut's price posting requirement, violate Section 1 of the Sherman Act, 15 U.S.C. 1, and thus contravene the Supremacy Clause of the Constitution of the United States, Article VI, Clause 2.

As outlined in Defendants Brief in Support of their Motion for Summary Judgment, this precise issue was raised and decided adversely to the Plaintiffs in *United States Brewers Association, Inc. v. Healy*, 532 F. Supp. 1312, 1329-30 (D. Conn. 1982), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982). The Second Circuit did not address the Supremacy Clause issue at that time, *Id.* at 278.

Defendants correctly assert that neither the affirmation nor the price posting requirements permanently condone, authorize, require or compel an agreement between or among

two or more private parties. In that § 1 of the Sherman Act is directed only to "contract[s], combination[s], in the form of trust or otherwise, or conspirac[ies] in restraint of trade or commerce", plaintiffs are confronted with the harsh reality that the challenged Connecticut laws do not compel any of the above. No agreement is mandated. Rather, the posting and affirmation schedules required to be filed by the Brewers are individual acts. Any alternative interpretation has already been dismissed by Judge Blumenfeld in *Brewers Ass'n*, at 1329:

> The basic flaw in plaintiffs' argument was pointed out by the court in its ruling on the motion for preliminary injunction "Absent an agreement among private parties, there cannot be a violation of Section One of the Sherman Act, 15 U.S.C. 1.

Notwithstanding further protestations, Judge Blumenfeld astutely concluded:

> It is also clear that the beer price affirmation statute requires only unilateral action by each brewer and importer. It does not require conduct which the antitrust laws forbid, and does not exert "irresistible economic pressure" on the plainatiffs to violate the Sherman Act. It follows that the statute does not implicate the Supremacy Clause, and, therefore plaintiffs' argument must be rejected. *Id.* at 1330. See also, *Morgan v. Division of Liquor Control*, 664 F.2d 353, 355 (2d Cir. 1981) *aff'g sub nom., Serlin Wine & Spirits Merchants, Inc. v. Healy*, 512 F. Supp. 936 (D. Conn. 1981)

Judge Blumenfeld's holding was subsequently incorporated by Judge Friendly of the Second Circuit in *Battipaglia, supra.* According to Judge Friendly:

> He [Judge Blumenfeld] correctly distinguished *Midcal* as involving an implicit agreement for resale price

> maintenance and cited *Serlin Wine & Spirits Merchants, Inc. v. Healey*, 512 F. Supp. 936, 938 (D. Conn. 1981), aff'd sub nom. *Morgan v. Division of Liquor Control*, 664 F.2d 353, 355 (2nd Cir. 1981). He [Judge Blumenfeld] then applied our holding in *Modern Home Inst. v. Hartford Accident Indemnity Co.*, 513 F.2d 102, 108–09 (2 Cir. 1975), that § 1 of the Sherman Act is directed only at joint action and does not prohibit independent business actions and decisions. *Id.* ata 6429.

The *Battipaglia* Court found that:

> The [Blumenfeld] position . . . is appealing. Section 1 requires an agreement, state compulsion of individual action is the very antithesis of an agreement, and the argument that an agreement could have been inferred if the wholesalers had involuntarily done what they have been compelled to do is simply too 'iffy.' *Id.* at 6431.

Plaintiffs in this action mount a Sherman Act attack on the Connecticut posting/affirmation statutes based upon an analogous "iffy" line of legal reasoning. It should be summarily dismissed.

Moreover, even if plaintiffs could convince the court that they were condoned, authorized, required or compelled to "agree" with one another, this challenge to the Connecticut posting /affirmation law statutes would fail. These statutes do not, individually nor collectively require the establishment of "minimum sale prices" for calendar month periods.[1] The posting element of the law solely requires that posted prices in Connecticut be maintained for 30 days.[2] The affirmation element to the law (as interpreted by the Department of Liquor Control), only contains affirmation as to a particular moment in time, e.g. 10:00 a.m. on the sixth of each month.[3]

Connecticut's law in no way mandates any action by out-of-state shippers. It is directed only at those Brewers who **choose** to do business in the state of Connecticut.[4]

Furthermore, should the brewers/importers have difficulties with the Massachusetts price law, they may resort to an appropriate Massachusetts court of competent jurisdiction. The suggestion that a symbiosis of Connecticut and Massachusetts liquor regulation law contravenes the Sherman Act tests the boundaries of even the most vivid imagination.[5]

Equally untenabale is plaintiffs' notion that Connecticut's posting/affirmation requirements, if engaged in by any such group of out-of-state shippers otherwise than under mandate of law, would violate Section 1 of the Sherman Act, 15 U.S.C. § 1. This argument was also rejected in *Battipaglia, supra.* See also, *Rice v. Norman William Co.*, 458 U.S. 654 (1982) in which the Court stated that:

> Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places **irresistable pressure** [emphasis added] on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed by the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws. *Id.* at 661.

The *Battipaglia* decision irrevocably refutes plaintiff's contentions concerning any antitrust violations in this case:

> Application of the *Norman Williams* standard calls for affirmance here even if we were to accept arguendo the contention that an exchange of price information and price adherence compelled by a state are to be treated, for the purpose of antitrust preemption analysis, as if they were voluntary. The Supreme Court has never held that the exchange of price information, in the language of *Norman Williams*, "necessarily constitutes a violation of the antitrust laws in all cases." Until *United States v. Container Corp.*, 393 U.S. 333 (1969), "[a] program to exchange price information was illegal only if, in addition to the agreement to exchange information, the defendants agreed to fix prices. *Id.* at 6434.

Even the *Container Corp.* decision was severely limited in application in that the Court observed that the industry in question was "dominated by relatively few sellers, that [the] product is fungible and the competition for sales is price," and that "[t]he demand is inelastic, as buyers place orders for immediate, short term needs," *Id.* at 334.

In his concurring opinion in *Container Corp.*, Justice Fortas observed that the Court did not "hold that the exchange of specific information among sellers as to prices charged to individual customers, pursuant to material arrangement, is a per se violation of the Sherman Act," 393 U.S. at 338-39. This has been subsequently cited by the Court to say that "the dissemination of price information is not itself a per se violation of the Sherman Act." *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 113 (1975).

As was the case in *Battipaglia* at 6436, Connecticut's posting/affirmation laws do not mandate or authorize conduct "that necessarily constitutes a violation of the antitrust laws in all cases." Brewers can fulfill all of their obligations

under the statute without either conspiring to fix prices or engaging in "conscious parallel" pricing.

The Connecticut laws, like the New York laws in *Battipaglia, Id.*, do not place "irresistible pressure on a private party to violate the antitrust laws in order to comply" with it. Instead, they simply require that, having announced a price independently chosen by the Brewer, the Brewer shall maintain it for a month, and that on the 6th of each month at 10:00 a.m., the Brewer shall affirm that "the bottle, can or case price, or price per keg, barrel, or fractional unit thereof, to the wholesaler permittees is no higher than the lowest price at which each such item of beer is offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state."[6]

In short, Plaintiffs contention that Connecticut's beer price affirmation provisions, in conjunction with Connecticut's price posting requirement, violates Section 1 of the Sherman Act and thus contravenes the Supremacy Clause of the Constitution of the United States, is groundless. There are simply no genuine issues of material fact concerning the constitutionality of Connecticut's posting/affirmation statutes. Defendants Motion for Summary Judgment of August 30, 1984 should be granted.

CONCLUSION

For all the foregoing reasons, Intervenor-Defendants urge this court to render Summary Judgment for the Defendants. In the alternative, we seek Summary Judgment for the Defendants on the Sherman Act/Supremacy Clause issue and urge the court to stay action on the Commerce Clause issue until the Connecticut Supreme Court renders judgment on the correct interpretation of statute involved, which would obviate this constitutional issue.

Respectfully submitted,

Intervenor/Defendant: Wine and Spirit Wholesalers of Connecticut, Inc.

By /s/ Alfred F. Wechsler

Alfred F. Wechsler, Its Attorney
Bailey and Wechsler
One Financial Plaza
Hartford, CT 06103
Tel.No.: (203) 525-9191

By /s/ William A. Wechsler

William A. Wechsler

By /s/ Kevin O'Leary

Kevin D. O'Leary

FOOTNOTES

[1] See Plaintiffs July 25, 1984 *Complaint for Declaratory and Injunctive Relief*, Count IV, Paragraph 53 at page 19.

[2] *Id.* Paragraph 53 distorts the statute. Connecticut posting law sets no minimum, nor for that matter, maximum price. The establishment of price is left to the Brewers.

[3] See Declaratory Ruling of the Department of Liquor Control entitled *Affidavit*, dated August 30, 1984, and attached hereto.

[4] In Paragraph 55 of their *Complaint*, Brewers refer to Massachusetts law; Massachusetts posting law is of no relevance to this case.

[5] See Paragraph 55 of the *Complaint*.

[6] Connecticut General Statute Section 30-63b(b); *see also* "Beer Affirmation Form" attached hereto. Moreover, even assuming arguendo that the purpose of the Connecticut statute was to discourage the competition, the federal antitrust laws do not prohibit a state "as sovereign" from imposing certain anti-competitive restraints "as an act of government" in order to effectuate an orderly market. (See *Parker v. Brown*, 317 U.S. 341, 352 63 S. Ct. 307, 314, 87 L.Ed. 315), see also *Bestway Beer and Soda Distributors, Inc. v. New York State Liquor Authority*, 99 A.D. 2d 727, 472 N.Y.S. 2d 350 (1984) (relating to New York statute prohibiting increase in price of beer sold to resale licensees within 180 days after last price decrease on such beer).

[Certificate of Service omitted in printing]

APPENDIX K

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

Civ. Action File No. H 84 816 (PCD)

February 13, 1985

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the plaintiffs, United States Brewers Association, Inc., et al., respectfully move this Court to enter summary judgment in their favor because 1) there is no genuine issue as to any material fact; and 2) it is entitled to judgment as a matter of law.

UNITED STATES BREWERS
ASSOCIATION, INC., et al.
Plaintiffs

By /s/ Lynn Anne Glover

J. Charles Mokriski
Lynn Anne Glover
Day, Berry & Howard
CityPlace
Hartford, CT 06103-3499
(203) 275-0100

[Certificate omitted in printing]

APPENDIX L

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

No. H84 816 PCD

Rule 9(c) Statement of Plaintiffs In Support of Their Cross-Motion for Summary Judgment

Pursuant to Rule 9(c) of the Local Rules of the United States District Court for the District of Connecticut, Plaintiffs state that there is no genuine issue to be tried with respect to the following material facts concerning Plaintiffs' claims that the Connecticut beer price affirmation provisions are unconstitutional.

1. Plaintiffs do not dispute the facts set forth in Defendants' Statement of Material Facts Not In Dispute made pursuant to Local Rule 9(c) (hereinafter, "Defendants' 9(c) Statement").

The Parties

2. Plaintiffs consist of the USBA (an industry association of 39 domestic brewers and 23 importers of which six such brewers sell beer to Connecticut wholesalers), four domestic brewers, and seven importers. (Complaint at ¶ 8; Defendants' 9(c) Statement at ¶ 1)

3. Each Plaintiff offers its product for sale in Connecticut to Connecticut wholesalers. (Complaint at ¶ 8; Defendants' 9(c) Statement at ¶ 2)

4. None of the Plaintiffs owns or operates a brewery in Connecticut. (Complaint at ¶ 20)

5. There are no breweries in Connecticut. (*Id.; United States Brewers Ass'n, Inc. v. Healy*, 532 F. Supp. 1312, 1317 (D. Conn. 1982) (hereinafter, "*Healy I*"))

6. Defendants John F. Healy and David L. Snyder are the existing commissioners of the Connecticut Department of Liquor Control. (Defendants' 9(c) Statement at ¶ 3; Affidavit of John F. Healy and David L. Snyder dated August 30, 1984 (hereinafter, "Declaratory Ruling") at ¶ 2)

7. Defendant Charles Kasmer is the Secretary of the Department of Liquor Control. (Defendants' 9(c) Statement at ¶ 3; Complaint at ¶ 23)

8. Defendants Healy, Snyder and Kasmer are vested with the authority and power to enforce the Connecticut Liquor Control Act, including the beer price affirmation provisions. (Declaratory Ruling at ¶ 3; Defendants' Rule 9(c) Statement at ¶ 3)

9. Intervenor-defendant Wine & Spirits Wholesalers of Connecticut, Inc. is a trade association consisting of seven members who sell alcoholic beverages at wholesale within the State of Connecticut. (Intervenor-Defendant's Answer to Interrogatories at 1).

Beer Marketing in Connecticut and the Border States

10. The beer industry in the four-state region of Connecticut and the Border States is broadly divided into three marketing levels: (i) the brewers and importers which in Connecticut are referred to as out-of-state shippers; (ii) the wholesalers which generally purchase beer from more than one brewer or importer; and (iii) the retailer which sells the beer to the ultimate consumer either for on-premises (bars, taverns, restaurants) or off-premises (package stores, grocery stores, etc.) consumption. (Complaint at ¶ 24; *Healy I* at 1319)

11. Domestic brewers generally offer their beer to wholesalers f.o.b. the brewery (that is, the price is based upon the delivery to and acceptance by the wholesaler at the brewery), and importers sell their products c.i.f. the port of entry (that is, based on delivery to and acceptance by the wholesaler at the port), although some importers do maintain warehouses and offer their products f.o.b. the warehouse.

12. The beer market in New York, Rhode Island and Massachusetts ("the Border States") is characterized by a great deal of price flexibility, variability and competition. (*Healy I* at 1320)

13. Due to less state regulation in certain Border States retail prices tend to be lower in those states than retail prices for the same products in Connecticut. (*Id.*)

14. Connecticut retailers by law, may purchase their beer only from one designated Connecticut wholesaler for each particular brand of beer. (Conn. Dep't. Liquor Control Reg. 30-6-B7)

15. New York has no legal division of wholesaler territories.

16. Connecticut law mandates that every retailer within a wholesaler's territory be offered the same price for each product regardless of volume sold or competitive conditions confronted by the wholesaler. (Conn. Liquor Control Act § 30-63(b))

17. New York and Rhode Island permit competitive differentiation among wholesalers in price and terms. (*Healy I*, at 1319-20)

18. Connecticut law prohibits price discounts or inducements of any kind to be offered to wholesalers whereas such discounts and inducements are available in each of the Border States. (Conn. Gen. Stat. Ann. § 30-63(b) (West Supp. 1984); *Healy I* at 1319-20)

19. Connecticut restrains the ability of brewers and importers to offer price promotions including barring discounts, requiring price changes to remain in effect for at least one month with respect to wholesale purchases, requiring uniform prices on all bottles and cans of the same size, however packaged, and requiring the brewer to absorb the majority of the costs of the promotion. (Conn. Gen. Stat. Ann. §§ 30-63(b) and (c) (West Supp. 1984); *id.* § 30-63c; *Healy I* at 1319)

20. The retail price of a particular brand of beer is very often lower across the border in the Border States than it is in the border areas of Connecticut. (*Healy I* at 1320)

21. Connecticut consumers living in these border areas historically have crossed state lines and purchased beer, either for on-premises or off-premises consumption in the Border States. (*Id.*)

Dated: Hartford, Connecticut
July , 1984

DAY, BERRY & HOWARD

By _____
(A Member of the Firm)
City Place
Hartford, Connecticut 0613-3499
(203) 275-0100
Attorneys for P ıintiffs

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
Attorneys for Plaintiff
Anheuser-Busch, Inc.

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Attorneys for Plaintiff
Miller Brewing Co.

COVINGTON & BURLING
1201 Pennsylvania, N.W.
Washington, D.C. 20044
Attorneys for Plaintiffs
United States Brewers
Association, Inc.,
G. Heilman Brewing Company,
The Genesee Brewing
Company, Inc.,
All Brand Importers, Inc.,
Dribeck Importers, Inc.,
Guiness-Harp Corp.,
Labatt Importers Inc.,
Martlett Importing Company,
Inc.,
Monterey Bay Company, Inc., and
Van Munching Company, Inc.

GARY NATEMAN, ESQ.
United States Brewers
Association, Inc.
1750 K. Street, N.W.
Washington, D.C. 20006
Attorney for Plaintiff
United States Brewers
Association, Inc.

APPENDIX M

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

No. H 84 816 PCD

MARCH 6, 1985

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Concurrent with the Defendants' Declaratory Ruling and the filing of Plaintiff's pleadings in this matter, the issues presented by this case have been substantially narrowed. In our view, it is clear that two erstwhile issues have been totally abandoned, i.e., any claim that the new Connecticut law has an impermissible extraterritorial thrust, and, those claims based upon the Supremacy Clause:

> As modified by the defendants' Declaratory Ruling, plaintiffs concede that on their face the new beer price affirmation provisions technically comply with *Healy I*. Furthermore, plaintiffs concede that the Declaratory Ruling technically renders the affirmation law facially valid under the Supremacy Clause. Accordingly, plaintiffs would consent to a dismissal of their claim based upon extraterritorial price regulation under *Healy I* and their Supremacy Clause claims specifically conditioned upon the interpretation and operation of the new law reflected in the defendants' Declaratory Ruling.

Plaintiff's Memorandum of Law at p. 18.

Thus, this case, in its present posture, is a virtual mirror replica of the controversy which was so ably analyzed by the District Court in 1982. *U.S. Brewers Assoc., Inc. v. Healy*, 532 F.Supp. 1312 (D. Conn. 1982). There, Judge Blumenfeld painstakingly addressed each issue which the Brewers presented. This litigation constitutes no more than a representation of those very same issues. In the interests of brevity and because the analysis contained therein so precisely relates to the issues of the instant controversy, we earnestly commend Judge Blumenfeld's product to this Court.

As we are all aware, the Court of Appeals ultimately reversed the District Court judgment, based upon a finding that the predecessor Connecticut affirmation law had the impermissible effect of establishing and ". . . controlling the minimum prices at which liquor may be sold outside of its own territory . . ." *U.S. Brewers Assoc., Inc. v. Healy*, 692 F.2d 275, 284 (2nd Cir. 1982). While this decision did not specifically affirm Judge Blumenfeld's articulations regarding the "all-out attack on the Connecticut beer price affirmation provisions under the Commerce Clause . . .", Ibid at 281, we submit that any fair reading of that case (with particular emphasis on pages 281-2 and footnotes thereon) must result in the conclusion that the Court of Appeals concurred with the lower court's treatment of the Commerce Clause issues, save for the "extraterritorial thrust". Hence, the Court, possibly anticipating the very Connecticut legislative amendments to the affirmation law which are presently under attack, held:

> Given the latitude allowed a state under the Twenty-first Amendment to regulate the sale of liquor within its own borders, the holding in *Seagram* might well validate beer price regulation less intrusive than the present Connecticut statute, such as a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set in the surrounding states, see 384 U.S. at 43-45, 86 S.Ct. at 1260-1261, leaving those out-of-state prices unregulated by Connecticut.
>
> *U.S. Brewers Assoc., Inc. v. Healy*, 692 F.2d 275, 283-4 (2nd Cir. 1982), aff'd. 104 S.Ct. 265 (1983).

The present Connecticut system of affirmation, as the Defendant Department has clearly indicated in its Declaratory Ruling, constitutes no more than "a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set in the surrounding states. . . ."

While we remain convinced that the District Court's ruling fully addresses and disposes of all claims he ein presented by the Brewers, we respond to the allegation that certain "new cases" support the tired claim of the Brewers that Connecticut's new law amounts to the forbidden economic protectionism and/or constitutes an undue burden.

New England Power Company v. New Hampshire, 455 U.S. 331 (1982) concerned the attempt by the State of New Hampshire to preclude the exportation of privately produced, hydroelectric energy, New Hampshire, in effect, ordered that the "cheaper" electricity first be distributed to its citizens before it was made available for purchase by other states' citizens. The Supreme Court rejected New Hampshire's arguments that this conduct was expressly permitted by federal law (Sec. 201(b), Federal Power Act). Thus, the state conduct was expressly permitted by federal law (Sec. 201(b), Federal Power Act). Thus, the state conduct was to be measured against the traditional negative implications of the Commerce Clause. In this posture, the conclusion was both obvious and inevitable:

> Our cases consistently have held that the Commerce Clause of the Constitution, Art. I, § 8, cl. 3, *precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within it borders or to the products derived therefrom.* E.g., *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911). Only recently, in *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978), we reiterated that "[t]hese cases stand for the

> the basic principle that a 'State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State.' " (quoting *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928).)
>
> *New England Power Co.*, supra at 338 (emphasis added)

A unanimous Supreme Court annnounced no new concepts in this case but merely again condemned "economic protectionism", noting that the New Hampshire scheme violated nearly all of the Commerce Clause prohibitions. Connecticut here does not grant a "preferred right of access" for its citizens to domestically produced beer but simply seeks, in the words of the District Court, "to secure 'fairer' or 'more equal' competition [which] can hardly be characterized as 'protectionist' within the meaning of the Commerce Clause". *U.S. Brewers Ass'n. Inc. v. Healy*, 532 F.Supp. 1312, 1323 (1982).

Most recently, *Bacchus Imports, Ltd. v. Dias*, 104 S.Ct. 3049 (1984) served as the vehicle for the Supreme Court to derail the efforts of Hawaii to legislatively "protect" a developing domestic liquor industry. Here, an exemption from a state excise tax, imposed on all other (domestic and non-domestic) liquors, was provided for two, locally produced, alcoholic beverages. As a result of this tax then, the price of these two beverages was lower than all others. Hawaii did not dispute (indeed, it asserted) that the purpose of the law was to encourage and promote the establishment of a new local industry. Since a more vivid example of "economic protectionism" can hardly be imagined, the Court's conclusion is not surprising:

> We therefore conclude that the Hawaii-Liquor Tax exemption for okolehao and pineapple wine violated the Commerce Clause because it had both the purpose and effect of discriminating in favor of local products.
>
> *Bacchus Imports, LTD v. Dias*, 104 S.Ct. 3049, 3058 (1984)

The Court further found that the Hawaiian scheme was not insulated from Commerce Clause strictures by Twenty-First Amendment powers, holding:

> The central purpose of the [21st Amend] was *not* to empower States to *favor local liquor* industries by erecting barriers to competition."

Id. at p. 3059 (emphasis added)

Bacchus serves to highlight the distinction which separates the Connecticut beer affirmation system from those schemes found to be constitutionally impermissible. Namely, there is no domestic beer product which Connecticut law seeks to protect. Connecticut has no beer manufacturers and thus there exists no entity to be protected.

It will not be lost upon this court, we are confident, that the Plaintiffs in the *Bacchus* case were the wholesalers who were *obligated* to pay the challenged tax. On that basis, the Supreme Court found that Plaintiffs had standing to maintain the lawsuit. Notably absent in the instant litigation are any out-of-state wholesalers or retailers whose ostensible rights the Brewers repeatedly try to assert. It is both reasonable and significant to recognize this absence and wonder why, if these individuals are so greatly effected, they are not present, seeking relief from the court.

One further case merits our attention: *U.S. Brewers Ass'n. Inc. v. Dir. Dept. of A.B.C.*, 100 N.M. 216, 668 P.2d 1093 (1983). In this case the New Mexico Supreme Court determined that the New Mexico beer affirmation system did not constitute an impermissible burden on interstate commerce, relying exp[illegible]ly upon *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.[illegible] (1966):

> A comp[illegible] of New York's Section 9 and the Act indicates [illegible] indistinguishable price affirmation setting. Both [illegible]quire wholesalers and retailers to file

> monthly price schedules with the respective state liquor authority accompanied by an affirmation that prices charged are no higher than the lowest price at which sales are made anywhere in the United States during the preceding month.
>
> *U.S. Brewers Ass'n v. Dir. Dept. of A.B.C.*, 668 P.2d 1093, 1097 (1983)

Quite obviously, this affirmation system, as described by the New Mexico Supreme Court, nearly duplicates the Connecticut system here under attack. Significantly, it could be argued that the New Mexico plan is "more burdensome", since it calls for the lowest price "*anywhere* in the United States during the preceding month" and not simply three contiguous states. Nonetheless, the United States Supreme Court dismissed an attempted appeal for want of a substantial federal question. *U.S. Brewers Ass'n Inc. v. Rodriquez*, 104 S.Ct. 1581, 80 L.Ed.2d 115 (1984). Justice Stevens, in a concurring opinion, and obviously reacting to the Brewers assertion that the Supreme Court's summary affirmance of the Court of Appeals decision in *U.S. Brewers Ass'n. Inc. v. Healy*, supra, demanded a different result, aptly observed:

> Our recent decision in *Healy*, invalidating a Connecticut price affirmation statute, does not undermine the New Mexico Supreme Court's reliance on *Joseph E. Seagram & Sons, Inc. v. Hostetter* and *Rice v. Norman Williams Co.* in upholding the constitutionality of the 1967 New Mexico Act as amended in 1979.
>
> *U.S. Brewers Ass'n Inc. v. Rodriquez*, 80 L.Ed.2d 115, 116.

Thus it seems quite apparent that *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1965) not only continues to be a sound recitation of the appropriate method to harmonize the command of the Commerce Clause with the grant of

authority of the Twenty-First Amendment, but that its teachings were not abrogated by *Healy*, supra. See also, *Bacchus*, supra, dissenting opinion of Stevens, at p. 3063, n. 10.

The parameters of this case, as with any other litigation, are defined by the allegations of the complaint. Fairly read, and in a light most favorable to the Plaintiffs, we submit that, despite assertions to the contrary, this case consists only of a facial attack upon the Connecticut law. The court will search in vain for any specific factual allegations which, if proven, could result in a conclusion that these general statutes, as applied, violate constitutional principles. We ask this court to reject Plaintiffs request that it serve as the legendary "Sword of Damocles" hanging over the Connecticut law. Obviously Plaintiffs are never foreclosed from initiating an action at any time when they can allege and prove that the implementation of this or any other Connecticut statute operates unconstitutionally.

In the face of Judge Blumenfeld's clear holding that the purpose of the Connecticut affirmation law was to secure only equal competition for Connecticut wholesalers, and *not* to discriminate against out-of-state business, *U.S. Brewers Ass'n, Inc. v. Healy*, 532 F.Supp. 1312, 1323 (1982), the Plaintiffs have virtually innundated this court with legislative history, (much of it relating to the predecessor 1981 legislation) seizing upon isolated comments of legislators and alleging an improper purpose. We would ask the court to be mindful of that legislation which is before it. It is virtually the same affirmation system as was contained in the prior Connecticut law except that, as the Plaintiffs themselves admit, the new provisions "were enacted as mere technical amendments to the former price affirmation law in order to attempt to comply with Healy I, . . ." Plaintiffs' Memorandum of Law, p. 14. The Plaintiffs cannot now be permitted to relitigate the purpose of the 1981 Connecticut affirmation law. That purpose has been found by the District Court and recognized by the Court of Appeals:

The district court found it undisputed that the purpose of these provisions was to lower the retail price of beer in Connecticut, thereby increasing the purchase of beer by Connecticut residents within the state and generating increased tax revenues for the state. 532 F.Supp. at 1316 17.

U.S. Brewers Ass'n Inc. v. Healy, 692 F.2d 275, 276 (1982)

Since the "new" provisions are simply "technical amendments" admittedly aimed only at correcting the constitutional infirmity perceived by the Court of Appeals, then such amendments cannot be viewed as substantially altering the purpose of the Act in general.

CONCLUSION

Based upon all of the pleadings and memoranda of the parties, we request that Plaintiffs' Motion for Summary Judgment be denied and Defendants' Motion for Summary Judgment be granted.

Respectfully submitted,

THE DEFENDANTS
JOHN F. HEALY, ET AL.

JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

BY /s/ Richard M. Sheridan

Richard M. Sheridan
Assistant Attorney General
555 Russell Road
P.O. Box 11424
Newington, Conn. 06111
Tel: 566-7570

BY /s/ Robert F. Vacchelli

Robert F. Vacchelli
Assistant Attorney General
555 Russell Road
P.O. Box 11424
Newington, Conn. 06111
Tel: 566-7570

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APPENDIX N

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

NO. H 84 816 PCD

MARCH 6, 1985

RESPONSE TO PLAINTIFFS' 9(c) STATEMENT

The Defendants, John F. Healy, et al., earlier filed their 9(c) Statement of Facts not in Dispute in connection with their Motion for Summary Judgment. None of the facts cited therein are disputed by Plaintiffs and the Defendants reaffirm these facts in response to Plaintiffs Cross-Motion for Summary Judgment.

With respect to the statement of facts recited by Plaintiffs, the Defendants accept such statements except as clarified hereunder:

1. Paragraph 12 of Plaintiffs' statement reads: "The beer market in New York, Rhode Island and Massachusetts (The Border States') is characterized by a great deal of price flexibility, variability and competition. (*Healy I* at 1320)". This is not an accurate paraphrase of the finding of the U.S. District Court in *Healy I*. The court found:

> At present, the brewers' pricing policies in New York and Rhode Island are characterized by a good deal of flexibility and variability. The New York City market is the most highly competitive, and accordingly, prices are often the lowest in the four-state region.

United States Brewers Ass'n Inc. v. Healy, 532 F.Supp. 1312, 1320 (D. Conn., 1982) rev'd. 692 F.2d 275 (2nd Cir., 1982) aff'd ____ U.S. ____, 104 S.Ct. 265, 78 L.Ed.2d 248 (1983)

Although we correct Plaintiffs' statement, we submit that this correction does not concern a material fact barring resolution of the case on the motions pending.

2. Paragraph 13 of Plaintiffs' statement reads: "Due to less state regulation in certain Border States retail prices tend to be lower in those states than retail prices for the same products in Connecticut. (*Id.*)" This is not an accurate paraphrase of the finding of the U.S. District Court in *Healy I*. The court found:

> Prices charged by brewers and importers to Connecticut wholesalers are neither the highest nor the lowest in the four-state area. Retail prices in Connecticut, however, are generally higher than those in the bordering states.
>
> *Healy*, supra at 1320

Although we correct Plaintiffs' statement, we submit that this correction does not concern a material fact barring resolution of the case on the motions pending.

3. Paragraph 14 of Plaintiffs' statement reads: "Connecticut retailers by law, may purchase their beer only from one designated Connecticut wholesaler for each particular brand of beer. (Conn. Dep't. of Liquor Control Reg. 30-6-B7)." This is not an accurate interpretation of the law. Regulation 30-6-B7 provides, in pertinent part, as follows:

> Each manufacturer and out-of-state shipper permittee shall file with the department a list of his authorized distributors, setting forth the brands and also

> the exact geographical area in which the distributor or wholesaler shall be authorized to sell, and shall also file a certificate from the wholesaler to the effect that he is, in fact, servicing the area designated and no other area for the brand or brands for which he has been appointed as distributor.
>
> Sec. 30-6-B7, Regulations of Connecticut State Agencies.

Under this section, a wholesaler may only sell to a retailer within the wholesaler's territory. The boundaries of the territory and the number of wholesalers appointed to service that territory are established at the choice of the out-of-state shipper. Public Act 84-432 provides that subsequent, additional beer wholesalers may be appointed for just and sufficient cause. Although we correct Plaintiffs' statement, we submit that this correction does not concern a material fact barring resolution of the case on the motions pending.

4. Paragraph 18 of Plaintiffs' statement reads: "Connecticut law prohibits price discounts or inducements of any kind to be offered to wholesalers whereas such discounts and inducements are available in each of the Border States. (Conn. Gen. Stat. Ann. Sec. 30-63(b) (West Supp. 1984); *Healy I* at 1319-20)". This is not an accurate paraphrase of the finding of the U.S. District Court in *Healy I*. The court found:

> All four states require licenses for those who market beer at each of the three levels involved; brewers, distributors and retailers. The net effect of this scheme is to entirely preclude sales by wholesalers in one state to retailers in another. At this point the uniformity ends. Massachusetts is similar to Connecticut in that it does have a price posting requirement applicable to brewers and importers, although there is no requirement that the posted price be equal to the lowest price charged for the same item in some other place. Massachusetts, like Connecticut, also

prohibits brewers or wholesalers from differentiating among their customers in respect of price or other items of trade, prohibits sales below cost by brewers, importers, and wholesalers, and requires that consumer resale price schedules be filed, although compliance by retailers is not mandatory in either state. At least, Massachusetts, like Connecticut, has recently passed a bottle bill which will require that cans and bottles be redeemable.

In New York and Rhode Island brewers and importers, unfettered by extensive regulation, can and do offer a range of price discounts to wholesalers for a variety of reasons. Discounts are offered for quantity sales, sales to special customers (the so-called home distributors in New York), to encourage advertising by wholesalers, for purposes of test marketing new products, and for promotional purposes.

Healy, supra, at 1319

Although we correct Plaintiffs' statement, we submit that this correction does not concern a material fact barring resolution of the case on the motions pending.

Respectfully submitted,

THE DEFENDANTS
JOHN F. HEALY, ET AL.

JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

BY /s/ Richard M. Sheridan

Richard M. Sheridan
Assistant Attorney General
555 Russell Road
P.O. Box 11424
Newington, Conn. 06111
Tel: 566-7570

BY /s/ Robert F. Vacchelli

Robert F. Vacchelli
Assistant Attorney General
555 Russell Road
P.O. Box 11424
Newington, Conn. 06111
Tel: 566-7570

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APPENDIX O

CONNECTICUT DEPARTMENT OF LIQUOR CONTROL REGULATIONS SECTIONS 30-6-B4–B12

Sec. 30-6-B4. Out-of-state shipper price lists to be filed

(a) Every out-of-state shipper permittee shall, annually on or before the **sixth** day of January, file with the **department** of liquor control, on forms prescribed by the **department**, one copy of a complete schedule, with each page of such schedule numbered in numerical order, duly verified by the permittee and attested to by the backer, if an individual, or if the backer is a corporation, by an officer of such corporation, of all alcoholic liquors offered for sale in Connecticut, which shall contain with respect to each item: (1) The type of beverage and brand name; (2) the size of the container; (3) the age or per cent and type of neutral spirits; (4) the proof; (5) the number of bottles per case; (6) the bottle and case price. The following information shall be submitted by out-of-state shipper beer only permittees: (1) The type of beverage; (2) the size of the container (barrel, half-barrel, quarter-barrel); (3) the number and size of botles per case; (4) the container price and case price. At the same time that these schedules are mailed to the department, a copy shall be forwarded to each wholesaler licensed by the department to distribute those products for which the schedule is intended.

(b) Except in the case of still wines and sparkling wines, the case price shall be individual for each item and not in combination with another item. Schedules on multiple packages of still wines and sparkling wines shall contain the bottle price for each item contained in the multiple package, the unit price, and the case price. The bottle price posted in such multiple package case must be the same as the bottle price posted in a case containing the one type and brand of wine. The price set forth therein shall become effective on the first day of the

calendar month following the effective filing date thereof and, unless withdrawn or amended, shall be considered refiled and effective each month until the filing date of the next complete schedule. All items shall be bona fide offering of the items set forth in the list. Price changes and prices on new items may be filed on supplemental price schedules, which schedules shall be filed on the **sixth** day of any intervening month, and prices on such supplemental schedules shall become effective on the first day of the month following the effective filing date thereof. When filing supplemental price lists showing amended prices, one copy of the whole numbered page on which the original prices appeared shall be filed. **One copy of such supplemental price list shall be filed, with a copy to the wholesaler licensed to distribute the product.**

(c) Except in cases where an obvious typographical error has been made, no changes, corrections or additions will be considered after the effective filing date. The effective price on any item shall be the price posted on the latest schedule on file on which that particular item appears.

(d) No out-of-state shipper may ship, transport, sell or offer for sale in Connecticut any brand of alcoholic liquor which does not appear on his price schedule.

(e) A violation of any of the provisions of this section shall be punishable by suspension or revocation.

(Effective January 11, 1984)

Sec. 30-6-B4a. Time of posting

(a) Price schedules filed on or before the sixth day of January pursuant to Section 30-6-B4 (a) shall be deemed posted on the sixth day of January at 10:00 a.m. Eastern Standard Time. If the sixth day of January is a Saturday, Sunday or

legal holiday, price schedules shall be filed on the next business day and shall be deemed posted on such next business day at 10:00 a.m. Eastern Standard Time.

(b) In accordance with Section 30-6-B4(b), such price schedule shall be deemed re-posted, unless a timely supplemental price schedule is filed, on the sixth day of each succeeding month at 10:00 a.m. Eastern Standard Time. If the sixth day of any succeeding month is a Saturday, Sunday or legal holiday, the price schedule shall be deemed reposted at 10:00 a.m. Eastern Standard Time on the next business day.

(c) Supplemental price schedules filed on the sixth day of any month shall be deemed posted at 10:00 a.m. Eastern Standard Time on that day and re-posted on the sixth day of each succeeding month at 10:00 a.m. Eastern Standard Time. If the sixth day of any month is a Saturday, Sunday or legal holiday, such supplemental price schedule shall be filed on the next business day, and shall be deemed posted or reposted, as the case may be, at 10:00 a.m. Eastern Standard Time, on such day.

(d) Any price schedule or supplemental price schedule filed late shall be ineffective for that month and shall be applicable for the next filing deadline. Any price schedule or supplemental price schedule filed early shall be applicable for the pending filing deadline.

Effective October 21, 1985)

Sec. 30-6-B5. Records of salesmen's expenses, allowances, bonuses, etc.

Every out-of-state shipper permittee shall be required to keep a record, either weekly or monthly, of all salaries, wages, expenses, allowances, bonuses, cash disbursements and gratuities, either in the form of cash or things of value, paid to any of his employees, agents or salesmen representing him in the state of Connecticut. Such records shall be available for inspection by the agents of the commission at all times during business hours.

Sec. 30-6-B6. Copy of home state license to accompany application

Every application for an out-of-state shipper's permit shall be accompanied by a photostatic copy or by other documentary evidence of a permit or license issued by the state in which the applicant derives authority to manufacture, sell or distribute alcoholic liquors.

Sec. 30-6-B7. Consignments; return of goods; authorized distributors

No out-of-state shipper permittee shall sell alcoholic liquors on consignment. No manufacturer, wholesaler or out-of-state shipper permittee shall take back any merchandise once sold, billed, shipped, delivered or received by any permittee unless such transaction has been approved by the **department**. A full and complete explanation of all circumstances shall accompany any request to take back merchandise. Each manufacturer and out-of-state shipper permittee shall file with the **department** a list of his authorized distributors, setting forth the brands and also the exact geographical area in which the distributor or wholesaler shall be authorized to sell, and shall also file a certificate from the wholesaler to the effect that he is, in fact, servicing the area designated and no other area for the brand or brands for which he has been appointed as distributor. Where a wholesaler has held a distributorship for less than **six** months, no change on the list of authorized distributors or wholesalers of a manufacturer or out-of-state shipper shall be made except after ninety days' notice by registered mail to all such authorized distributors or wholesalers affected by such change which appear on the list of the particular manufacturer or out-of-state shipper as recorded in the office of the **department** of liquor control, and except after ninety days' like notice to and approval by the **department**. Such changes may be made without waiting the ninety days with the approval of the **department** where waivers are executed by the distributors or wholesalers

concerned, or where the geographical area of distribution has not been already allocated to a distributor or wholesaler, or after a hearing has been held, upon presentation of sufficient evidence of any violation of the liquor control act or regulations of the **department**, or evidence of any other act detrimental to the orderly conduct of the business, in which a present authorized distributor or wholesaler has been involved. The notice of change shall indicate that the name of the permittee is to be an additional distributor or wholesaler or, in the case of eliminating the name of a present distributor or wholesaler, with or without substituting another permittee's name, the notice of the change shall so indicate an "elimination" or "substitution." Geographical areas of distribution shall be submitted either by townships or counties or statewide, and any change in geographical area of distribution shall fully conform to the same essential conditions as required in the notice of change to distributors or wholesalers.

(Effective January 11, 1984)

B

Manufacturer and Wholesaler Permits

Sec. 30-6-B8. Records of purchases

Every holder of a manufacturer or wholesaler permit shall maintain a complete monthly record of all purchases made and shipments received by him of all alcoholic liquors, which shall include the number of cases, with inclusive serial numbers, from whom received, the type and brand name, the price and the date of delivery thereof. Such records shall be maintained at all times on the permit premises and be made available to the commission or its agents upon request. Any refusal of a permittee or his duly authorized agent to permit examination of the records, upon request, by an agent of the commission shall be construed as a violation of this section. These provisions become important under the law regulating credit. The commission shall hold permittees strictly accountable for such records.

Sec. 30-6-B9. Restriction of sales

No alcoholic liquor shall be sold or delivered by any wholesaler or manufacturer permittee except from his permit premises.

(Effective August 28, 1984)

Sec. 30-6-B10. Sales of alcoholic liquors, other than alcohol and wine for industrial purposes, to nonpermittees

Every wholesaler permittee shall submit to the commission, in duplicate, within five days of the date of delivery, an invoice of all alcoholic liquors, other than alcohol and wine to be used for the purposes specified in section 30-77 of the general statutes, sold to nonpermittees for industrial purposes. Such invoice shall disclose the name of the seller, the name of the purchaser, the date of sale and the quantity and type of alcoholic liquor. Such wholesaler permittee shall keep, upon the permit premises, a separate account of all such transactions available for investigation by the commission and its agents.

Sec. 3[illegible]-B11.

Repealed, May 3, 1966.

Sec. 30-6-B12. Manufacturer and wholesaler price lists to be filed

(a) Each manufacturer and wholesaler permittee shall, annually, on or before the **twelfth** day of December, file with the **department** of liquor control on forms prescribed by the **department** one copy of a complete schedule, with each page of such schedule numbered and in numerical order, duly verified by the permittee and attested by the backer if an

individual or, if the backer is a corporation, by an officer of such corporation, of all alcoholic liquors offered for sale in Connecticut. These lists shall contain with respect to each item: (1) The type of beverage and brand name; (2) the size of the container; (3) the age or per cent and type of neutral spirits; (4) the proof; (5) the number of bottles per case; (6) the bottle price and case price which shall include all customs, duties, federal taxes, state taxes and cost of delivery to the permittee. If a manufacturer or wholesaler sells to another manufacturer or wholesaler, the prices shall be submitted on a separate schedule; (7) the name of the publication or publications the prices will appear in. If not published, the affidavit required by subsection (g) shall be submitted. The following information shall be submitted only by manufacturer and wholesaler beer permittees: (1) The type of beverage; (2) the size of the container (barrel, half-barrel, quarter-barrel); (3) the number and size of bottles per case; (4) the container price and case price; (5) the name of the publication or publications the prices will appear in. If not published, the affidavit required by subsection (g) shall be submitted.

(b) Except in the case of still wines and sparkling wines, the case price shall be individual for each item and not in combination with another item. Schedules on multiple packages of still wines and sparkling wines shall contain the bottle price for each item contained in the multiple package, the unit price, and the case price. The bottle price posted in such multiple package case must be the same as the bottle price posted in a case containing the one type and brand of wine. The price set forth therein shall become effective on the first day of the calendar month following the effective filing date thereof and, unless withdrawn or amended, shall be considered refiled and effective each month until the filing date of the next complete schedule.

(c) Price changes and prices on new items may be filed on supplemental price schedules, which schedules shall be filed on or before the twelfth day of any month, and the prices on such supplemental schedules shall become effective on the

first day of the month following the effective filing date thereof. One copy of such supplemental price schedules showing amended prices shall be filed and only price changes and prices on new items should be listed.

(d) No changes, corrections or additions will be considered after the effective filing date, except in cases where obvious typographical errors have been made **and except where otherwise allowed by statute.**

(e) No manufacturer or wholesaler permittee may sell or offer for sale any brand of alcoholic liquor which does not appear on his price schedule. All items listed shall be bona fide offerings of the items set forth in the list and each manufacturer and wholesaler, upon request of the **department,** shall furnish the **department** with an inventory of any items that appear on his list. All liquor sold in less than case units at wholesale shall be sold at the per bottle price posted.

(f) All liquors shall be shipped and received by the purchaser in the same period for which the prices set forth in the invoices are in effect.

(g) Each manufacturer and wholesaler shall furnish each permittee customer with a copy of his price schedule, as amended, either by direct mail or by publishing his price schedule in any publication approved by the **department** of liquor control, provided, in accordance with the method used, the manufacturer, wholesaler or publication shall, on or before the tenth day of the month for which such schedule is effective, submit an affidavit that the provisions of this section have been complied with. If the manufacturer or wholesaler permittee solicits a new account, he shall, before making any sales, present a current price schedule to such account.

(h) A manufacturer or wholesaler posting prices on private labels shall submit those prices on separate sheets distinctly marked "Private Labels."

(i) Each price schedule filed shall contain the statement that the manufacturer or wholesaler is a "present authorized distributor" of all brands on which prices are quoted. If for any reason a manufacturer or wholesaler files prices on any items or brands of which he is not an authorized distributor, such items or brands shall be listed as "close-outs." Prices on so-called "close-out" items shall be filed every month even though they remain the same. Such items shall be disposed of within three months and shall not be listed on more than three successive lists without permission of the **department** and the **department** will strike from the list those items unless the distributor presents the department with satisfactory reasons for not doing so.

(j) A violation of any of the provisions of this section shall be punishable by suspension or revocation.

(Effective January 11, 1984)

APPENDIX P

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES BREWERS ASSOCIATION, et al.	:	
—vs—	:	Civil No. H-84-816 (PCD)
JOHN T. HEALY, et al.	:	

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs are the United States Brewers Association ("USBA") — an industry association of thirty-nine domestic brewers and twenty-three importers of beer — and those of its member companies who sell beer in Connecticut and in the bordering states of Massachusetts, New York and Rhode Island.

Defendants are the Commissioners and Secretary of the Connecticut Department of Liquor Control.

Intervening defendant Wine & Spirits Wholesalers of Connecticut is a trade association of seven companies which sell alcoholic beverages, including beer, at wholesale within Connecticut.

Plaintiffs' complaint seeks a declaratory judgment that the beer price affirmation provisions of Conn. Pub. Act

84-332,[1] 84-432[2] and § 30-63a(b) of the Connecticut Liquor

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[1] Conn. Pub. Act 84-332 provides, in relevant part:

> Each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department on a monthly basis, the bottle, can and case price, and for beer, the price per keg or barrel or fractional unit thereof, of any brand of goods offered for sale in Connecticut, which price when so posted shall be the controlling price for such manufacturer, wholesaler and out-of-state shipper permittee for the month following such posting.
>
> . . . . .
>
> . . . . .
>
> At the time of posting of the bottle, can, keg or barrel and case price . . ., every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that at the time of posting the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees is no higher than the lowest price at which each such item of beer is sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state. . . .
>
> . . . . .
>
> This section shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state . . . at any time during the calendar month covered by such posting. . . .
>
> In determining the lowest price for which any item of beer is or was sold . . . at the time of posting, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any such wholesaler; provided that differentials in price which make only due allowance for the actual costs of delivery are permissible. . . . A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes, approved by the department of liquor control, of his brand which he offers to any wholesaler in any state bordering this state. . . .

[2] Conn. Pub. Act 84-432 provides, in part: "In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered during such posted period by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, [only differentials in price attributable to differences in state taxes and to delivery costs are permissible]."

Control Act[3] violate the commerce clause[4] and the supremacy clause[5] of the United States Constitution. Plaintiffs also seek a permanent injunction to restrain defendants from enforcing these statutes.

Currently pending are cross-motions for summary judgment, which have been exhaustively and intelligently briefed and rebriefed by the USBA, the intervening defendants and the State Attorney General's Office. For the reasons that follow, USBA's motion is denied, and the motion of defendants and intervening defendants is granted.

I. Background

A. The Beer Industry[6]

The beer industry in Connecticut is divided into three marketing levels: (1) brewers and importers; (2) wholesalers; and (3) retailers. Each market participant must hold a valid

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[3] Section 30-63a(b), Conn. Gen. Stat., provides, in part, that:

> No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer . . . at a bottle, can or case price, or price per keg, barrel or fractional unit thereof, higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

[4] "Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." U.S. Const. art. I, § 8, cl. 4.

[5] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

[6] This description is based on submissions of the parties as well as the findings of Blumenfeld, J., in *United States Brewers Ass'n v. Healy*, 532 F. Supp. 1312 (D. Conn.), *rev'd*, 692 F.2d 275 (1982), *aff'd*, 464 U.S. 909 (1983).

Connecticut license to sell, in Connecticut, alcoholic beverages to the tier below and, ultimately, to consumers.

The brewers and importers market national brands such as Budweiser or Miller High Life, and regional or local brands such as Genesee Cream Ale or Piels. There are no breweries in Connecticut. All beer — national or regional — is shipped into Connecticut by brewers and importers designated as "out-of-state shippers" under Connecticut law.

Plaintiffs contend that prices charged and package configurations offered to wholesalers in Connecticut and the bordering states vary in the several markets within the four state area. (Market areas do not always coincide with state borders.) In certain markets, regional brewers or importers price their beers to allow sales to consumers at the lowest prices possible in those markets. Other brewers or importers competing in these areas must consider this competitive pricing in pricing their own product. It is agreed by all parties that the New York City market is the most competitive and prices there are the lowest in the four-state region. Other factors which have an impact on pricing and marketing decisions, such as consumer tastes, packaging, costs and freight, vary from area to area even within these states. Thus, according to plaintiffs, a variable pricing and marketing structure has emerged in Connecticut and the bordering states which results in substantial interstate competition in retail beer sales.

In Connecticut, typically more than one wholesaler sells an out-of-state shipper's products. Each wholesaler generally handles products of more than one out-of-state shipper but is restricted by law from selling to retailers outside its assigned geographical territory.

The primary retail outlets for off-premise consumption of beer in Connecticut are package and grocery stores. Retailers, particularly near the borders, face substantial competition from retail beer outlets in the bordering states. Although prices charged to Connecticut wholesalers are

neither the highest nor the lowest in the four-state region, retail prices historically have been higher in Connecticut. Accordingly, many Connecticut residents have purchased beer at lower retail prices in New York, Massachusetts or Rhode Island.

B. **Price Affirmation**

In 1981, Connecticut amended its Liquor Control Act by adding beer price affirmation provisions. The Act required out-of-state shippers to post, each month, the bottle, can and case price for the brands of beer each sells in Connecticut. The amendment required shippers to execute written affirmations under oath certifying that the posted prices "will be no higher than the lowest price at which each such item of beer is *or will be* sold . . . to any wholesaler in any state bordering this state, at any time during the calendar month covered by such posting." Liquor Control Act § 30-63b(b), as originally amended by Section 12 of Conn. Pub. Act 81-294 (emphasis added). No brewer or importer could sell beer to a wholesaler in Connecticut at a price higher than the lowest price then charged any wholesaler in any state bordering Connecticut: Liquor Control Act § 30-633a(b), as originally amended by Section 11 of Conn. Pub. Act 81-294. Once posted, the affirmed price became the controlling or fixed price for the ensuing month for the out-of-state shipper's products in Connecticut. Rebates, discounts, special promotions and other inducements which lowered the price of beer in the border states required the price to be lowered in Connecticut, but differentials in price were permitted for different state taxes and delivery costs. No allowance was made for different package configurations (e.g., a case of six-packs versus a case of loose cans or bottles), yet for any brand a brewer offered for sale in Connecticut, it had to offer Connecticut wholesalers all the units of that brand offered to wholesalers in the border states.

Thus brewers and importers in the four-state area had the following alternatives: (1) lower their Connecticut prices to

equal the lowest price in any bordering state; (2) raise prices in border states to the Connecticut levels; (3) withdraw from Connecticut the brands of beer sold at lower prices in the border states; or (4) withdraw from the border states the brands of beer sold at lower prices than the Connecticut price.

The 1981 amendments were upheld by the district court, *United States Brewers Ass'n v. Healy*, 532 F. Supp. 1312 (D.Conn. 1982), but declared unconstitutional by the Second Circuit, *United States Brewers Ass'n v. Healy*, 692 F.2d 275 (2d Cir. 1982), (hereinafter "*Healy I*"), *aff'd without opinion*, 464 U.S. 909 (1983). The Court of Appeals held that the price affirmation provisions impermissibly burdened interstate commerce and that the twenty-first amendment[7] did not authorize Connecticut to set minimum prices of beer in any other state.

Thereafter, Connecticut enacted the different version of beer price affirmation set out in notes 1-2, *supra*. Instead of requiring out-of-state brewers and importers to certify that their prices "will be" no lower in any of the border states during the month following the posting of prices in Connecticut, the new statute requires only that at the moment of affirmation the prices charged to Connecticut wholesalers *are* no higher than the lowest price then being charged in any border state.

C. The Present Controversy

In their complaint, plaintiffs originally alleged that:

> the interaction of the posting and affirmation provisions of Pub. Act 84-332 with Section 30-63a(b) of the Liquor Control Act not only limits the price at which out-of-state shippers may sell to Connecticut

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[7] "The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

> wholesalers, but also sets the lowest price which an out-of-state shipper may charge anywhere in the Border States during the succeeding month. Thus, as under the original price affirmation scheme, an out-of-state shipper is not free to lower any Border State price below the previously affirmed Connecticut price.

Complaint at 14. They argue that the new provisions violate the supremacy clause by requiring out-of-state shippers to establish and maintain minimum prices for each item of beer in the four-state area and by precluding them from dealing with any of their customers except on the same or more favorable terms as they dealt with other of their customers, viz, Connecticut was forcing them to engage in conduct prohibited by federal antitrust laws.

Defendants conceded that, "standing alone," Conn. Gen. Stat. § 30-63a(b), which was not amended following *Healy I*, appeared to prohibit the lowering of out-of-state prices of products sold in Connecticut during the entire month following the posting of Connecticut prices for that product. Defendants' Brief on Motion for Summary Judgment at 8. However, defendants contend that such an interpretation flies in the face of Conn. Pub. Act 84-332 which explicitly recognizes the right of out-of-state shippers to raise or lower their prices outside Connecticut at any time during the month following posting. In further support of their position, defendants filed a declaration and ruling by the Connecticut Liquor Control Commission.[8] The ruling made clear that, whatever the import of § 30-63a(b), out-of-state shippers need only affirm that at the time of posting in Connecticut (and *only* at the time of

[8] Conn. Gen. Stat. § 4-176 states that the Liquor Control Commission "may, in its discretion, issue declaratory rulings as to the applicability of any statutory provision or of any regulation or order of the agency . . ."

posting), their prices to Connecticut wholesalers are no higher than in the border states.[9]

After the Commission's ruling,[10] plaintiffs withdrew their claim based on the supremacy clause and conceded that the affirmation laws, as interpreted by the Commission, would not directly control prices in the border states. Plaintiffs' Memorandum in Support of Their Cross-Motion for Partial Summary Judgment at 18. However, plaintiffs persist in their claim that the affirmation provisions on their face and as applied,

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[9] The Commission stated:

> [W]e must interpret [§ 30-63a(b)] in light of the obvious intention of the Connecticut General Assembly . . . Accordingly, we determine and declare that C.G.S. § 30-63a(b) mandates only that the brewer in a sale to a Connecticut wholesaler not exceed its previously posted price in Connecticut, but that a sale at a price lower in a border state, during the calendar month covered by such posting, does not contravene this section . . . To the extent . . . that C.G.S. § 30-63a(b) is inconsistent with [Conn. Pub. Act. 84-332], it must be considered impliedly repealed since the latest expression of the legislature controls. Thus under the new affirmation scheme an out-of-state shipper is free to lower any border state price below the previously affirmed Connecticut price.

Affidavit of the Liquor Commission at 3-4.

[10] For the importance of having definitive indications as to how any particular affirmation will be applied, *see Brown-Forman Distillers v. N.Y. Liquor Auth.*, 106 S. Ct. 2080 (1986), wherein the majority laments that "we have no means of predicting how the [New York] Liquor Authority would" react to an application for a price reduction following posting, and chastizes the dissenters for "indulging [in the] assumption that the Authority will be sensitive to Commerce Clause concerns." *Id.* at 2087, 2086 n.5. The dissent, in turn, expressed the view that the Liquor Authority, like any agency "charged with rectifying questionable applications of necessarily general rules," was entitled to a presumption of constitutionality "consistent with the respect due state administrative organs responsible for the operation of a state law whose constitutionality is challenged . . ." *Id.* at 2089-90. The ambiguity presented in *Brown-Forman* was avoided by the Commission's ruling. It is to be commended.

> are purely protectionist legislation designed to protect in-state wholesalers and retailers at the expense of out-of-state brewers, wholesalers and retailers. The purpose and effect of the new law is precisely the same as the old law — discouraging purchases of beer by Connecticut residents in the Border Strates by requiring the brewers to offer their products to Connecticut wholesalers at prices which are artificially lower than competition would warrant, or conversely, to artificially raise their prices to Border State wholesalers.

Id. at 19.

Plaintiffs' cross-motion for summary judgment is, thus, bottomed on the unconstitutionality of the amended price affirmation law. Conversely, defendants' motion is based on the claim that the legislation is constitutional.

II. Discussion

A. Summary Judgment Standard

To grant a motion for summary judgment, there can be no "genuine issue as to any material fact" and the moving party must be "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Schwabenbaur v. Board of Educ.*, 667 F.2d 305, 313 (2d Cir. 1981). "The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute." *American Int'l Group, Inc. v. London American Int'l Corp.*, 664 F.2d 348, 351 (2d Cir. 1981), quoting *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319–20 (2d Cir. 1975). Moreover, there must be no controversy as to inferences which may be drawn from the facts of record. *Phoenix Sav. & Loan, Inc. v. Aetna Cas. & Sur. Co.*, 381 F.2d 245, 249 (4th Cir. 1967). In determining whether or not there is a genuine factual issue in the case, the court must "resolve all ambiguities and draw all reasonable inferences against the

moving party." *Schwabenbauer*, 667 F.2d at 313; *see also United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). However, one against whom summary judgment is sought cannot rely on factually unsubstantiated conclusory allegations to sustain a claim that questions of fact exist. *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552–53 (1986). That both sides have moved for summary judgment "does not mean that the court must grant judgment as a matter of law for one side or the other," *Schwabenbaur*, 667 F.2d at 314, and it is error to "assume that no material facts remain in dispute simply because both parties moved for summary judgment." *In re Citizens Loan & Sav. Co.*, 621 F.2d 911, 913 (8th Cir. 1980) (citation omitted).

B. The Commerce Clause and the Twenty-First Amendment

Judges must not, in the exercise of the judicial function, undertake to second-guess the political judgment of legislators. Quite to the contrary, judges must refrain from reading their own policy preferences into the Constitution by striking down legislation deemed to be unwise or even foolish. *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905); *see also 324 Liquor Corp. v. Duffy*, 107 S.Ct. 720, 733–34 (1987). Although courts must determine whether a challenged statute is or is not constitutional — a task concededly involving judgment and interpretation — legislation is presumed constitutional unless clearly shown not to be so. *State v. Warren*, 169 Conn. 207, 217 (1975). Moreover, where a statute permits of two constructions, one valid and the other invalid as unconstitutional, the valid construction should be adopted "even where it is not the obvious one." *Lublin v. Brown*, 168 Conn. 212, 219–20 (1975).

A state's authority to regulate aspects of the liquor industry is greater than other areas of regulation by virtue of the twenty-first amendment. Section 2 of that amendment provides: "The transportation or importation into any State,

Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited." Section 2 "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Because a state may entirely exclude alcoholic beverages from its markets, less restrictive forms of regulation are within a state's authority.

> The Twenty-first Amendment thus gives the states broad power to ban, restrict, or otherwise regulate importation and in-state traffic in alcoholic beverages and thereby eliminates some of the otherwise applicable Commerce Clause constraints. For example, a state may prohibit entirely the sale of intoxicating liquors within its borders, *see State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 62-63 (1936) although under traditional Commerce Clause limitations it could not ban the sale of other products, *see, e.g., Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. [514,] 521 [(1935)] (wholesale milk) . . . . Or a state may prohibit local dealers from selling beer manufactured in another state on the ground that the latter state discriminate against beer manufactured in the first state, *see Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U.S. 391 (1939), although it would not be free to impose the same type of restrictions with respect to milk, *see Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976); nor could it constitutionally prohibit the exportation of local ground water to another state on the basis that the latter state would forbid exportation of its water to the first state, *see Sporhase v. Nebraska*, 458 U.S. 941 (1982).

Healy I, 692 F.2d at 280-281 (other citations omitted). [11]

However, as *Healy I* states, not even in the area of regulating intoxicating beverages is the authority of a state absolute.[12] The twenty-first amendment "has not operated totally to repeal the Commerce Clause in the area of the regulation of traffic in liquor." *Joseph E. Seagrem & Sons v. Hostetter*, 384 U.S. 35, 42 (1966). The commerce clause — though worded as a grant of affirmative power to Congress — has traditionally been interpreted to limit state action which affects economic activities outside its own borders. "In general the Commerce Clause is viewed as intending to promote free trade among the states and to liberate the flow of articles in commerce from the provincialism evident in local regulations." *Healy I*, 692 F.2d at 278.[13] State statutes which directly discriminate against interstate commerce or which favor in-state economic interests over out-of-state interests are per se

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[11]The distinction drawn by the Court of Appeals between milk and liquor may not be quite as sharp following the Supreme Court's decision in *Brown-Forman* in which the Court relied heavily on *Seelig* in overturning New York's affirmation statute.

[12]The Supreme Court is currently divided as to how extensively the twenty-first amendment was intended to authorize state regulation of the liquor industry. *Compare* the opinion of the Court, (Powell, J.), in *324 Liquor Corp.*, 107 S. Ct. at 726 (the "States' Twenty-first Amendment powers, though broad, are circumscribed by other provisions of the Constitution"), *with* the dissent, (O'Connor, J.), *id.* at 730 (endorsing former Justice Black's view "that the Senators who approved the Twenty-first Amendment thought they were returning absolute control over the liquor industry to the States"). *See also Newport v. Iacobucci*, 107 S. Ct. 383 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984).

[13]From the late nineteenth century until the New Deal, the commerce clause was used — often in conjunction with the due process clause of the fourteenth amendment — to invalidate numerous state regulatory measures. *See, e.g., Seelig*. From 1945 to 1970 the commerce clause was invoked rarely — and the due process clause hardly at all — to strike down economic legislation. In the last decade, the Supreme Court increasingly entertained objections to state statutes based on the burdens imposed on interstate commerce. *See, e.g., New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982).

unconstitutional. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Bacchus Imports*. Even where a state statute "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental," it will not be sustained if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citations omitted). "[T]here is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman*, 106 S. Ct. at 2084.

Thus, "the Twenty-first Amendment and the Commerce Clause 'each must be consideed in light of the other and in the context of the issues and interests at stake in any concrete case." *Id.* at 2087, quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964); *see Midcal*, 445 U.S. at 109 (what is required in this area is a "pragmatic effort to harmonize state and federal powers").

C. **The Affirmation Issue**

Against the foregoing general principles, the cases in the field of liquor affirmation must be examined for their application to the legislation adopted by Connecticut.

In *Seagram*, the Supreme Court unanimously upheld a New York requirement that alcoholic beverage brand owners affirm that the price charged to New York wholesalers was "no higher than the lowest price" than was charged anywhere in the country in the *preceding* month.

> The mere fact that § 9 [the price affirmation section] is geared to appellant's pricing policies in other States is not sufficient to invalidate the statute. As part of its regulatory scheme for the sale of liquor, New York

> may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country. The serious discriminatory effects of § 9 alleged by appellants on their business outside New York are largely matters of conjecture. . . . It will be time enough to assess the alleged extraterritorial effects of § 9 when a case arises that clearly presents them. "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids."

Seagram, 384 U.S. at 43, quoting Osborn v. Ozlin, 310 U.S. 53, 62 (1940). Although the Court thus rejected the argument that the New York affirmation law was facially invalid, it made clear that future decisions would depend on the facts of each case. *See id.* at 52 ("it is possible that specific future application of [the statute] may engender concrete applications of constitutional dimension").

Indeed, the next challenge to New York's affirmation law, the challenge was successful. In *Brown-Forman*, the Court declared unconstitutional an amended version which required distillers to affirm that the price charged to New York wholesalers "is no higher than the lowest price at which such item of liquor *will be* sold by such [distiller] to any wholesaler anywhere" in the nation. Alcoholic Beverage Control Law § 101-b(3)(d) (McKinney Supp. 1986) (emphasis added). The Court stressed the fact that, by requiring such an affirmation, New York made it illegal for distillers to reduce prices in other states during the following month in which the posted New York prices were in effect. By so doing, New York had " 'project[ed] its legislation' into other States" in violation of the commerce clause. *Brown-Forman*, 106 S. Ct. at 2087, quoting *Seelig*, 294 U.S. at 52.

> While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other

> States surrender whatever competitive advantages they may possess. Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States . . . . The mere fact that the effects of New York's [affirmation law] are triggered only by sales of liquor within the State of New York . . . does not validate the law if it regulates the out-of-state transactions of distillers who sell in-state.

Id. at 2085.

The Court distinguished *Seagram* on the ground that the earlier version of New York's affirmation law was *retrospective* in nature — requiring only that the affirmed price be no higher than the lowest price at which sales were made during the *previous* month — whereas the amended version was *prospective*. Thus, the earlier version regulated the price charged in New York in relation to prices charged outside the state, whereas the later version limited prices charged outside the state for the month after the price was posted in New York. This was precisely the distinction relied on by the Second Circuit in *Healy I* in striking down Connecticut's original beer price affirmation law (which also had a prospective reach).

> The New York statute [in *Seagram*] differed significantly from the Connecticut statute, because, unlike Connecticut's [original] beer price affirmation provisions which control brewers' *future* conduct in the states surrounding Connecticut, the New York law in *Seagram* merely required that New York prices reflect what had been charged elsewhere in the past. Thus, the New York law, although it affected the prices that manufacturers would choose to set in other states, did not limit the freedom of a manufacturer at any given time to raise or lower prices in any other state.

692 F.2d at 283.

Brown-Forman explicitly embraced *Healy I*:

> We agree with . . . the *Healy* court that a "prospective" statute such as Connecticut's [original] beer affirmation statute, or New York's liquor affirmation statute, regulates out-of-state transactions in violation of the Commerce Clause. Once a distiller has posted prices in New York, it is not free to change its prices elsewhere in the United States during the relevant month. Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce. . . . While New York may regulate the sale of liquor within its borders, and may seek lower prices for its residents [as it did in *Seagram*], it may not "project its legislation into [other States] by regulating the price to be paid" for liquor in those States.

Id. at 2086 (citations omitted).

The 1984 amendments to Connecticut's beer affirmation statute make the affirmation statute neither retrospective nor prospective but, rather, contemporaneous. Brewers must affirm that the price charged at 10:00 a.m. on the sixth day of each month to Connecticut wholesalers is no higher — *at that moment* — than the lowest price then being charged to wholesalers in the border states. The posted price must remain in effect in Connecticut for one month. Nonetheless, brewers and importers are free to raise or lower their prices in the border states. Of course a brewer or importer is still obliged to factor into its business decisions the recognition that its lowest price in any of the border states on the day of posting must be offered to Connecticut wholesalers for the ensuing month. The issue in the instant case, therefore, is whether Connecticut's requirement that prices to its wholesalers be fixed by pricing decisions in other states violates the commerce clause.

There is little doubt that Connecticut's present affirmation law would be constitutional under *Seagram*. The difficulty lies in assessing *Seagram's* precedent vitality. *Brown-Forman* decided only the questions presented in that case and left open the constitutionality of affirmation statutes less oppressive than the prospective legislation there struck down. Although the Court appeared to emphasize that the different result from that in *Seagram* resulted from the difference between retrospective and prospective affirmation laws, the Court qualified its analysis:

> While we hold that New York's prospective price affirmation statute violates the Commerce Clause, we do not necessarily attach constitutional significance to the difference between a prospective statute and the retrospective statute at issue in *Seagram*. Indeed, one could argue that the effects of the statute in *Seagram* do not differ markedly from the effects of the statute at issue in the present case. If there is a conflict between today's decision and the *Seagram* decision, however, there will be time enough to address that conflict should a case arise involving a retrospective statute. Because no such statute is before us now, we need not consider the continuing validity of *Seagram*.

Id. at 2087 n.6. Justice Blackmun, who joined the opinion of the Court (except for footnote 6), filed a concurrence to state that he "would go further and overrule" *Seagram*, which he characterized as "a relic of the past":

> [*Seagram*] was decided when affirmation statutes were comparatively new and long before the proliferation of overlapping and potentially conflicting affirmation statutes that has taken place in the last two decades. I see no principled distinction that can be drawn for constitutional analysis between New York's current prospective statute and the same State's retroactive statute upheld in *Seagram* . . . . Either type, despite one's best efforts at fine tuning, operates

> to affect out-of-state transactions and violates the Commerce Clause. Our failure to overrule *Seagram* now merely preserves uncertainty and will breed or necessitate further litigation. We should face reality and overrule *Seagram*.

Id. at 2088.

Despite the "uncertainty" referred to by Justice Blackmun, Connecticut's beer affirmation statute is here held to be constitutional. Such a finding comports with the presumption of validity to which all economic regulatory legislation is entitled. Such a finding comports, also, with the spirit of the twenty-first amendment, which was intended to return broad control of the liquor industry to the states. And it accords with dicta in *Healy I* to the effect that "[g]iven the latitude allowed a state under the Twenty-first Amendment . . . *Seagram* might well validate beer price regulation less intrusive than the present Connecticut statute, such as a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set in the surrounding states . . . leaving those out-of-state prices unregulated by Connecticut." *Seagram*, 692 F.2d at 283-284.

Above all, such a finding is consistent with the Supreme Court's interpretation of the commerce clause as it has evolved to date. Whatever the future fate of *Seagram*, no other Justice joined Blackmun's call in *Brown-Forman* for its demise; it remains to be considered by lower courts, unless and until it is formally overruled. *Cf. Healy I*, 532 F. Supp. at 1325 n.48 (rejecting USBA's argument that *Seagram* must be relegated to a "different era" of constitutional adjudication). Under *Seagram*, Connecticut's affirmation statute is facially valid because, unlike the version in *Healy I* and *Brown-Forman*, it leaves brewers free to raise or lower prices in the border states before and after posting in Connecticut and does not, therefore, regulate interstate commerce. Although plaintiffs cite

numerous excerpts from the legislative debates over beer price affirmation to show that many voted for the measure intended it to protect local wholesalers and retailers from the competition of wholesalers and retailers in the border states,[14] the price flexibility provided by the latest amendments destroys much, if not all, of the force of their argument. Moreover, Connecticut is not seeking lower or better prices for its wholesalers relative to out-of-state wholesalers, but simply equal prices. "The legislative intent to secure 'fairer' or 'more equal' competition can hardly be characterized as 'protectionist' within the meaning of the Commerce Clause." *Healy I*, 532 F. Supp. at 1323.

In addition to being facially valid, the statute also passes muster under the second of the two-tier standard enunciated in *Pike*. "[T]he critical consideration" — under either test — "is the overall effect of the statute on both local and interstate activity." *Brown-Forman*, 106 S. Ct. at 2084. Crediting USBA's assertions that some business of Connecticut residents previously going to border state retailers will shift to Connecticut retailers, and that some "artificially" high prices (in the border states) and/or some "artificially" low prices (in Connecticut) will result from beer price affirmation even as amended, the "mere fact" that an affirmation law "is geared to . . . pricing policies in other States is not sufficient to invalidate the statute" because a state may "constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country," *Seagram*, 384 U.S. at 43, and because a "non-discriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981). Any state economic regulatory legislation exerts some impact on interstate commerce and courts should be cautious in striking down such legislation merely because "the faintest

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[14]On this point, see the district court opinion in *Healy I*, 532 F. Supp. at 1318 n.16, 1323 n.41.

economic ripples begin to flow outside state borders . . . ." *Brown-Forman*, 106 S. Ct. at 2091 n.8 (Stevens, J., dissenting). The disincentive to Connecticut consumers to buy outside the state, not shown to be of more than minor economic significance, and the necessity that brewers set their prices in the border states knowing that they are simultaneously setting their prices in Connecticut are not an excessive intrusion on commerce. Because Connecticut's statute operates evenhandedly and serves a legitimate purpose in reducing discrimination in pricing to wholesalers in Connecticut as opposed to out-of-state wholesalers, such incidental and indirect burdens on interstate commerce do not outweigh the resulting local benefits.

Finally, it is worth noting that the commerce clause, though often construed as restrictive of a state's authority, does not prohibit anything. It is a positive grant of authority to Congress to regulate matters of national economic importance. Since Connecticut is only one of over thirty states with affirmation laws, the problems posed by "overlapping and potentially conflicting affirmation statutes," *id.* at 2088 (Blackmun, J., concurring)[15] are appropriate subjects for Congress to address — consistent, of course, with the limits imposed on both Congress and courts by the twenty-first amendment. To date, Congress has not done so. Plaintiffs may press their case in the national legislative arena, a better use of the powers created by the Constitution than to have this court strike down state regulatory legislation with a legitimate local purpose that does not impermissibly burden interstate commerce.

Accordingly, defendants' motion for summary judgment is granted.

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[15]Statutes, such as Connecticut's, enacted in several states, though overlapping, are unlikely to conflict, but, as pointed to prices at the lowest common denominator, are more likely to produce harmony, i.e., uniform low prices.

SO ORDERED.

Dated at Hartford, Connecticut, this 11th day of September, 1987.

/s/ Peter C. Dorsey

Peter C. Dorsey
United States District Judge

APPENDIX Q

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES BREWERS ASSOCIATION, ET AL.	)	
VS.	)	CIVIL H-84-816 PCD
JOHN T. HEALY, ET AL.	)	

JUDGMENT

This action having come on for consideration of the cross-motions for summary judgment before the Honorable Peter C. Dorsey, United States District Judge, and

The Court having considered the full record of the case including applicable principles of law, and the Court having filed its Ruling on Cross-Motions for Summary Judgment, granting the defendants motion,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the defendants.

Dated at Hartford, Connecticut, this 15th day of September 1987.

KEVIN F. ROWE,
Clerk

By Dennis P. Iavarone

Dennis P. Iavarone
Deputy in Charge

APPENDIX R

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

NO. H 84 816 PCD

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Plaintiffs, The Beer Institute (formerly named United States Brewers Association, Inc.); Anheuser-Busch, Inc.; G. Heileman Brewing Company; The Genesee Brewing Company, Inc.; Miller Brewing Company; All Brand Importers, Inc.; Dribeck Importers, Inc.; Guiness-Harp Corp.; Labatt Importers, Inc.; Martlett Importing Company, Inc.; Monterey Bay Company, Inc.; and Van Munching Company, Inc., hereby appeal to the United States Court of Appeals for the Second Circuit from the Judgment entered by the Clerk of this Court on September 15, 1987 in the above-captioned action which granted the defendants' motion for summary judgment, denied plaintiffs' cross-motion for summary judgment and entered judgment for defendants. Plaintiffs appeal from each and every part of the aforesaid Judgment.

Dated: Hartford, Connecticut
October 13, 1987

DAY, BERRY & HOWARD

By /s/ J. Charles Mokriski

(A Member of the Firm)
J. Charles Mokriski
City Place
Hartford, Connecticut 06103-3499
(203) 275-0100
Attorneys for Plaintiffs

SKADDEN, ARPS, SLATE
MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 735-3000
Attorneys for Plaintiff
Anheuser-Busch, Inc.

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700
Attorneys for Plaintiff
Miller Brewing Company

COVINGTON & BURLING
1201 Pennsylvania, N.W.
Washington, D.C. 20044
(202) 662-6000
Attorneys for Plaintiffs
The Beer Institute,
G. Heileman Brewing Company,
The Genessee Brewing
Company, Inc.,
All Brand Importers, Inc.,
Dribeck Importers, Inc.,
Guiness-Harp Corp.,
Labatt Importers Inc.,
Martlett Importing Company,
Inc.,
Monterey Bay Company, Inc., and
Van Munching Company, Inc.

GARY NATEMAN, ESQ.
The Beer Institute
1750 K Street, N.W.
Washington, D.C. 20006
(202) 331-0300
Attorney for Plaintiff
The Beer Institute

[Certificate of Service omitted in printing]

APPENDIX S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 721 — August Term, 1987

(Argued March 18, 1988 Decided JUN 13 1988)

Docket No. 87-7880

THE BEER INSTITUTE (formerly named UNITED STATES BREWERS ASSOCIATION, INC.) as an association, and on behalf of its following members selling beer in the State of Connecticut and the bordering States of Massachusetts, New York and Rhode Island:

Anheuser-Busch, Inc., Miller Brewing Company, Latrobe Brewing Company, Pabst Brewing Company, The Stroh Brewery Company.

ANHEUSER-BUSCH, INC; G. HEILEMAN BREWING COMPANY; THE GENESEE BREWING COMPANY INC., MILLER BREWING COMPANY; ALL BRAND IMPORTERS, INC.; DRIBECK IMPORTERS, INC., GUINESS-HARP CORP.; LABATT IMPORTERS, INC., MARTLETT IMPORTING COMPANY, INC.; MONTEREY BAY COMPANY, INC.; and VAN MUNCHING COMPANY, INC.,

Plaintiffs-Appellants,

—against—

JOHN F. HEALY and DAVID L. SNYDER, as Commissioners of the Department of Liquor Control; and CHARLES KASMER, as Secretary of the Department of Liquor Control,

Defendants-Appellees,

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC., as an association, and on behalf of its following members selling alcoholic liquor in the State of Connecticut:

JOHNNY BARTON, INC.; THE BRESCOME DISTRIBUTORS CORPORATION; CONNECTICUT DISTRIBUTORS, INC.; EDER BROS., INC.; GALLO WINE MERCHANTS INC.; ALLAN S. GOODMAN, INC.; and HARTLEY & PARKER LIMITED, INC.,

Intervenors
Defendants-Appellees.

Before: TIMBERS, PRATT and MINER, *Circuit Judges.*

Appeal from a summary judgment in favor of appellees entered in the United States District Court for the District of Connecticut (Dorsey, J.), holding that the amended beer price affirmation provisions of the Connecticut Liquor Control Act did not violate the commerce clause.

Reversed.

JEFFREY GLEKEL, New York, NY (Timothy G. Reynolds, Skadden, Arps, Slate, Meagher & Flom, New York, NY; William H. Allen, Covington & Burling, Washington, DC; Jerome I. Chapman, Arnold & Porter, Washington, DC; Gary Nateman, The Beer Institute, Washington, DC, of counsel) *for Plaintiffs-Appellants.*

ROBERT F. VACCHELLI, Asst. Conn. Atty. Gen., Newington, CT (Joseph I. Lieberman, Conn. Atty. Gen., Richard M. Sheridan, Asst. Conn. Atty. Gen., of counsel) *for Defendants-Appellees.*

WILLIAM A. WECHSLER, Hartford, CT (Alfred F. Wechsler, Gregory J. Southworth, Bailey & Wechsler, Hartford, CT, of counsel) *for Intervenors-Defendants-Appellees.*

MINER, *Circuit Judge*:

Plaintiffs-appellants The Beer Institute (formerly United States Brewers Association), an industry association of beer brewers and importers, *et al.*, commenced an action in the United States District Court for the District of Connecticut (Dorsey, J.) against defendants-appellees John F. Healy and David L. Snyder, as Commissioners of the Connecticut Department of Liquor Control, and Charles Kasmer, as Secretary of the Department. The complaint asserted that the amended beer price affirmation provisions of the Connecticut Liquor Control Act, 1984 Conn. Acts 332, 432, and § 30-63a(b) of that Act violate the commerce clause, U.S. Const. art. I, § 8, cl. 3, and the supremacy clause, *id.* art. VI, cl. 2. Plaintiffs sought declaratory and injunctive relief to prevent enforcement of these provisions.

Upon cross-motions for summary judgment, the district court granted judgment for the defendants, holding that the challenged provisions were constitutional. *See United States Brewers Ass'n v. Healy*, 669 F. Supp. 543 (D. Conn. 1987). Plaintiffs appeal from this judgment. Because we find that the amended beer price affirmation provisions place an unconstitutional burden on interstate commerce, we reverse.

BACKGROUND

In *United States Brewers Ass'n v. Healy*, 692 F.2d 275 (2d Cir. 1982) ("*Healy I*"), *aff'd*, 464 U.S. 909 (1983) (per curiam), we found that the original beer price affirmation provisions of the Connecticut Liquor Control Act placed an unconstitutional burden on interstate commerce. The Act, now as then, requires "posting" of prices, whereby brewers and out-of-state beer importers "file a schedule stating the per-unit price that [they] will charge Connecticut wholesalers for [beer] products in the following month," *id.* at 276 (footnoted omitted); *see* Conn. Gen. Stat. Ann. § 30-63c (West 1975 & Supp. 1988). Posted prices become effective on the first day of the calendar month following the posting. *See* Conn.

Agencies Regs. § 30-6-B12(b). We noted that "[h]istorically the retail price of beer has been generally higher in Connecticut than in its neighboring states, *i.e.*, Massachusetts, New York, and Rhode Island," 692 F.2d at 276.

To encourage Connecticut residents to buy beer in-state rather than in the neighboring states, the legislature added beer price affirmation provisions to the Act. These provisions required that: (1) brewers adhere to the posted prices during the one-month period for which they were posted, Conn. Gen. Stat. Ann. § 30-63(c); (2) brewers file a sworn affirmation that their posted per-unit prices would be no higher than their prices in the border states for the same period, *id.* § 30-63b(b); (3) Connecticut wholesalers be charged per-unit prices by each brewer no higher than the lowest wholesale price the brewer charges in any border state, *id.* § 30-63a(b); (4) adjustments for rebates, discounts, allowances and any other inducements offered to out-of-state wholesalers be considered in calculating the "lowest" price, *id.* § 30-63c(b); and (5) brewers offer to Connecticut wholesalers all the sizes and packages of their brands offered to border state wholesalers, *id.* Because there are no breweries in Connecticut and all beer is shipped into Connecticut from other states, only out-of-state brewers and importers are affected by the Connecticut price affirmation law.

In striking down the price affirmation provisions as facially invalid, this court observed that they told "a brewer that for any given month when it sells beer to a wholesaler in Massachusetts, New York, or Rhode Island, it may not do so at a price lower than that it has previously announced it will charge to Connecticut wholesalers," *Healy I*, 692 F.2d at 282. "Thus," we concluded, "the obvious effect of the Connecticut statute is to control the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a sale outside of Connecticut," *id.*, in violation of the commerce clause.

Thereafter, the Connecticut Legislature amended the affirmation provisions with the stated purpose of remedying the constitutional problem. Section 30-63b(b) was amended to provide that the "lowest" price charged to border-state wholesalers is determined "at the time of posting," 1984 Conn. Acts 332 ("84-332").[1] At the same time, section 30-63b(e)[2] was added, providing that § 30-63b did not prohibit brewers from changing prices in other states "at any time during the calendar month covered by such posting." However, § 30-63a(b),[3] which prevents brewers from charging Connecticut wholesalers more than their lowest border-state price during the posted period, was not amended. Section 30-63c(b), which establishes how price will be determined under the statute, also was amended by 84-332 to refer to "price . . . at the time of posting." Another amendment applicable to § 30-63c(b) contained a conflicting description of price. This amendment permits only differentials in state taxes and actual delivery costs to be excluded from the determination of "the lowest price" charged to any border-state wholesaler "*during such posted period*," 1984 Conn. Acts 432 ("84-432")[4] (emphasis added), despite the "time of posting" amendment made by 84-332.

Appellants commenced this action on July 25, 1984. In their complaint appellants alleged that " 'the interaction of the posting and affirmation provisions' " of 84-332 and § 30-63a(b) " 'not only limits the price at which out-of-state shippers may sell to Connecticut wholesalers, but also sets the lowest price which an out-of-state shipper may charge anywhere in the Border States during the succeeding month,' " 669 F. Supp. at 547 (quoting Complaint at 14). " 'Thus,' " they alleged, " 'as under the original price affirmation scheme, an out-of-state shipper is not free to lower any Border State price below the previously affirmed Connecticut price,' " *id.* This, they claimed, violated not only the commerce clause, but the supremacy clause as well, "by requiring out-of-state shippers to establish and maintain minimum prices for each item of beer in the four-state area and by precluding them from dealing with any of their customers except on the same or more favorable terms as they dealt with other of their customers," *id.*

The state recognized that § 30-63a(b) " 'standing alone' " seemingly would prevent brewers from lowering the out-of-state prices of products they also sold in Connecticut during the entire month after posting. The state argued, however, that 84-332 made it clear that the price affirmed as the lowest price in the border states need only be effective *at the moment of posting:* brewers are free both before and after posting to raise or lower their prices outside Connecticut. (The posted Connecticut price remains in effect for the following calendar month.) The state submitted a Declaration and Ruling of the Connecticut Liquor Control Commission, made pursuant to the Commission's discretionary authority to "issue declaratory rulings as to the applicability of any statutory provision or of any regulation or order of the agency," Conn. Gen. Stat. Ann. § 4-176, providing, *inter alia:*

> "[W]e must interpret [§ 30-63a(b)] in light of the obvious intention of the Connecticut General Assembly. . . . Accordingly, we determine and declare that C.G.S. § 30-63a(b) mandates only that the brewer in a sale to a Connecticut wholesaler not exceed its previously posted price in Connecticut, but that a sale at a price lower in a border state, during the calendar month covered by such posting, does not contravene this section. . . . To the extent . . . that C.G.S. § 30-63a(b) is inconsistent with [Conn. Pub. Act 84-332], it must be considered impliedly repealed since the latest expression of the legislature controls. Thus under the new affirmation scheme an out-of-state shipper is free to lower any border state price below the previously affirmed Connecticut price."

669 F. Supp. at 547 n.9 (quoting Affidavit of the Liquor Commission at 3-4). Thereafter, appellants withdrew their supremacy clause claim. *See id.* at 548.

The district court observed that "[t]he ruling made clear that, whatever the import of § 30-63a(b), out-of-state shippers need only affirm that at the time of posting in Connecticut

(and *only* at the time of posting), their prices to Connecticut wholesalers are no higher than in the border states," *id.* at 547 (footnote omitted). Judge Dorsey found that "[t]he 1984 amendments to Connecticut's beer affirmation statute make the affirmation statute neither retrospective nor prospective but, rather, contemporaneous," *id.* at 551–52.[5] He therefore framed the issue as "whether Connecticut's requirement that prices to its wholesalers be fixed by pricing decisions in other states violates the commerce clause," *id.* at 552.[6]

Judge Dorsey had "little doubt that Connecticut's present affirmation law would be constitutional under *Seagram [v. Hostetter,* 384 U.S. 35 (1966)]," *id.*, which upheld a *retrospective* affirmation requirement that the New York wholesale price was no higher than the lowest price in any other state during the *preceding* month. However, noting that *Seagram* had been questioned by the Court in *Brown-Forman Distillers Corp. v. New York State Liquor Authority,* 476 U.S. 573 (1986), Judge Dorsey held that the affirmation provisions nonetheless were constitutional, both on their face and in their effect, because: (1) "unlike the version in *Healy I* and *Brown-Forman,*" this statute "leaves brewers free to raise or lower prices in the border states before and after posting in Connecticut and does not, therefore, regulate interstate commerce," 669 F. Supp. at 553; (2) "Connecticut is not seeking lower or better prices for its wholesalers relative to out-of-state wholesalers, but simply equal prices," *id.;* and (3) the statute "operates even-handedly" and legitimately reduces price discrimination against Connecticut wholesalers, *id.* Holding the amended price affirmation provisions constitutional, he stated, "comports with the presumption of validity to which all economic regulatory legislation is entitled" and "with the spirit of the twenty-first amendment, which was intended to return broad control of the liquor industry to the states," *id.* at 552.

On appeal, appellants, as they did in *Healy I,* "have launched an all-out attack on the Connecticut beer price affirmation provisions under the [c]ommerce [c]lause," 692 F.2d at

281, contending that the provisions are protectionist in purpose and effect, are subverted by the *Brown-Forman* decision because it has "significantly undermine[d]" the precedential authority of *Seagram*, and operate to regulate beer prices in the border states in violation of the commerce clause and in excess of Connecticut's regulatory powers under the twenty-first amendment. Because we agree that the realities of beer price regulation in the border state area show that Connecticut's statute inevitably exercises control over "the prices set for sales occurring wholly outside its territory," *id.* at 282, we do not reach the issue of economic protectionism. Accordingly, we hold that the amended Connecticut beer price affirmation provisions directly regulate interstate commerce in violation of the Constitution.

DISCUSSION

A. Commerce Clause

The commerce clause generally forbids "[s]tate regulation that is designed to confer economic benefits on [its] businesses and residents . . . at the expense of businesses and residents of other states," *Healy I*, 692 F.2d at 279; *see, e.g., Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 350–53 (1977). However, "the fact that the law may not have been intended as protectionist or discriminatory will not save it" when the "effect of a state's law is to regulate conduct occurring wholly outside the state," *Healy I*, 692 F.2d at 279; *see, e.g., Edgar v. Mite Corp.*, 457 U.S. 624, 642–43 (1982) (opinion of White, J.); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925). Thus, "[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," it generally is invalidated "without further inquiry," *Brown-Forman*, 476 U.S. at 579; *see, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). When a statute only indirectly affects interstate commerce and regulates evenhandedly, the inquiry is "whether the [s]tate's interest [in regulation] is

legitimate and whether the burden on interstate commerce clearly exceeds the local benefits," *Brown-Forman*, 476 U.S. at 579; *see Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The Supreme Court has emphasized that whether the regulation is direct or indirect, "the critical consideration is the overall effect of the statute on both local and interstate activity," *Brown-Forman*, 476 U.S. at 579; *see Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440–41 (1978), and the interaction of the statute with the regulatory schemes of neighboring states constitutes an "overall effect" which appropriately is considered. *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671 (1981) (plurality) (Iowa law prohibiting 65-ft. double-trailer trucks "now out of step with the laws of all other Midwestern and Western States"); *Raymond Motor Transp.*, 434 U.S. at 445 (Wisconsin double-truck length limitations prevented interline transfers "from carriers that operate only in the 33 States where the doubles are legal"); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 527–28 (1959) (interference with interline transfers by unique Illinois mudguard law); *Southern Pacific Co.*, 325 U.S. at 774–75 (1945) (Arizona train-length law effectively "control[led] train operations beyond the boundaries of the state" by requiring dismantling and reforming of interstate trains at state line); *see also Silver v. Woolf*, 694 F.2d 8, 14 (2nd Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983).

The district court found that the amended Connecticut beer price affirmation provisions do not regulate interstate commerce because they do not prohibit brewers from raising or lowering beer prices in the border states prior to, or following, the Connecticut posting. However, the court did not examine whether in fact the interaction of the Connecticut provisions with the beer price regulations of bordering states would allow such pricing flexibility. Since Connecticut has chosen to regulate beer prices *in reference to* the regulated prices in the border states, it is particularly appropriate to examine the effect of the Connecticut beer price affirmation provisions resulting from their interaction with the regulatory

schemes of the border states. *See Brown-Forman*, 476 U.S. at 580, 583–84.

The Massachusetts beer pricing scheme requires brewers to post prices by the first day of the month to become effective on the first day of the following calendar month. These posted prices cannot be changed by the brewer. *See* Mass. Ann. Laws ch. 138, § 25B(d) (Law. Co-op. 1981). As interpreted by the Liquor Control Commission, the Connecticut law requires brewers to affirm that the beer prices they post, at 10:00 a.m. on the sixth day of each month, *see* Conn. Agencies Regs. § 30-6-B4a, are no higher than the prices that the brewer is then charging in the border states.

Thus, for example, a brewer who posts his February prices for Massachusetts on January 1 must look ahead to the posting and affirmation of his March prices on February 6 in Connecticut. The February prices that he posts in Massachusetts on January 1 will be effective and unchangeable at the time he must post and affirm his Connecticut prices for March on February 6. Therefore, the brewer cannot post a price in Massachusetts that is lower than the price he plans to post over a month later in Connecticut. In this way, a brewer posting his next-month's beer prices in Massachusetts does so under the restriction of Connecticut's affirmation law, which requires that the Connecticut price not be "higher than the lowest price at which such item is then being sold or offered for sale or shipped . . . to any wholesaler" in a border state, Conn. Gen. Stat. Ann. § 30-63a(b). Moreover, the price that the brewer posts in Massachusetts, as he looks ahead to the Connecticut affirmation day, will be effective not merely on that day, but for that *entire* month in Massachusetts. A brewer can therefore undertake competitive pricing based on the market realities of either Massachusetts or Connecticut, but not both, because the Connecticut statute ties pricing to the regulatory schemes of the border states.

In New York, a price that is decreased "per case, draft package or special package of beer sold to beer wholesalers"

cannot be raised for at least 180 days. *See* N.Y. Alco. Bev. Cont. Law § 55-b(2) (McKinney 1987). A brewer who plans to decrease his New York prices on a particular beer package, like the brewer posting his prices in Massachusetts, is confronted with the Connecticut posting and affirmation requirements. Once a price decrease becomes effective in New York, that price will control the price he may offer in Connecticut. On the sixth day of each month in which the New York price reduction is effective, the Connecticut statute will not allow the brewer to charge a higher price in Connecticut for the following month, no matter what the market realities would otherwise dictate. Thus, a brewer could not raise his Connecticut price above the New York level for a total of six calendar months, because the Connecticut statute, in effect, makes the New York pricing decision a decision for Connecticut as well. In addition, the Connecticut affirmation day falling in the last month of the New York price decrease would give Connecticut the benefit of the decreased price for a calendar month beyond the date that it terminates in New York. Clearly this restricts a brewer's ability to promote a beer in New York that also is sold in Connecticut. Moreover, a brewer who sells in both markets would be severely hampered in his ability to respond to market forces, particularly to the competitive demands of the New York City market, the most competitive and lowest priced market in the four-state region, *see* 669 F. Supp. at 546.

Both the Massachusetts and New York statutes provide for administrative exemptions from the beer pricing laws. *See* Mass. Ann. Laws ch. 138, § 25B(d) (exemption only by "written permission of the [Alcoholic Beverages] [C]ommission . . . granted for good cause shown and for reasons not inconsistent with the purpose of this chapter"); N.Y. Alco. Bev. Cont. Law § 55-b(3)(c) ("for good cause shown to its satisfaction" Liquor Authority "may grant waivers to licensees adversely affected by this section"). However, the possibility that an administrative agency may in its discretion grant a deviation from regulatory requirements cannot save the Connecticut statute or shift the responsibility for its effects upon the

regulatory bodies of other states. As the Court observed in *Brown-Forman*, "[w]e would not solve the constitutional problems inherent" in Connecticut's amended affirmation provisions "by indulging the . . . assumption that the [Liquor] Authority will be sensitive to [c]ommerce [c]ause concerns . . . . The protection afforded by the [c]ommerce [c]lause cannot be made to depend on the good grace of a state agency," 476 U.S. at 582 n.5.

Connecticut's affirmation provisions also regulate beer prices in another way: restricting a brewer's ability to offer volume discounts in the border states. While volume discounting is unlawful in Connecticut, *see* Conn. Gen. Stat. Ann. § 30-63(b), it is not generally prohibited in the border states. Brewers complying with the Connecticut affirmation statute must affirm that their prices for the entire state are no higher than any volume-discounted prices offered in competitive border-state markets. The effect of the Connecticut statute is to restrict a brewer's ability to offer volume discounts in competitive markets of the border states since the brewer could then not charge a higher price in the less competitive Connecticut market. In this way, as well, the Connecticut statute regulates pricing in other states.

Connecticut urges us to uphold the statute under *Seagram*. However, Connecticut can find no solace in *Seagram*. We observed in *Healy I* that "the holding in *Seagram* might well validate beer price regulation less intrusive than the" former Connecticut affirmation provisions, "such as a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set it in the surrounding states," 692 F.2d at 283-84. We did not thereby endorse regulation which had the effect of controlling wholesaler beer prices in other states. In fact, we indicated that the validity of such an amended scheme turned on its "leaving those out-of-state prices unregulated by Connecticut," *id.* at 284.

Moreover, the Court has cast doubt upon the continuing validity of the principles underlying *Seagram*. The *Brown-Forman* majority did "not necessarily attach constitutional

significance to the difference between a prospective statute," such as the one it struck down, "and the retrospective statute at issue in *Seagram*." 476 U.S. at 584 n.6. The Court recognized that "one could argue that the effects of the statute in *Seagram* do not differ markedly from the effects of the statute at issue in the present case" but declined to "consider the continuing validity of *Seagram*" since no retrospective statute was before the Court. *Id.* Writing separately, Justice Blackmun would have overruled *Seagram* as "a relic of the past" decided "when affirmation statutes were comparatively new and long before the proliferation of overlapping and potentially conflicting affirmation statutes," *id.* at 586 (Blackmun, J., concurring). He saw "no principled distinction" between the two types of statutes because both, "despite one's best efforts at fine-tuning, operat[e] to affect out-of-state transactions and violat[e] the [c]ommerce [c]lause," *id.*; Note, *Liquor Price Affirmation Statutes and the Dormant Commerce Clause*, 86 Mich. L. Rev. 186, 188 (1987) (concluding "that *all* liquor price affirmation statutes violate the commerce clause").

We, of course, are not empowered to overrule Supreme Court precedent. However, we clearly perceive that the basis of the *Seagram* decision has been eroded and that the Court has indicated strongly that *Seagram* may not survive the decision in *Brown-Forman*. In fact, the *Seagram* court recognized that it perhaps had not had the last word, observing that there would be "time enough to assess the alleged extraterritorial effects" of affirmation statutes "when a case arises that clearly presents them," 384 U.S. at 43. This is such a case. Accordingly, we decline to *extend* the *Seagram* precedent to validate a simultaneous affirmation provision that, by its purposeful interaction with border-state regulatory schemes, operates to control prices beyond Connecticut's borders.

B. **Twenty-First Amendment**

Connecticut maintains that the beer price affirmation provisions represent a valid exercise of its power under the twenty-first amendment "to regulate, or prohibit entirely, the

transportation or importation of intoxicating liquor within [its] borders," *324 Liquor Corp. v. Duffy*, 107 S. Ct. 720, 726 (1987). However, "[i]t is well settled that the [t]wenty-first [a]mendment did not entirely remove state regulation of alcohol from the reach of the [c]ommerce [c]lause." *Brown-Forman*, 476 U.S. at 584. The amendment reserves to states power to regulate " '*transportation* or *importation*' " of liquor " '*into* any [s]tate . . . for delivery or use *therein*,' " *Healy I*, 692 F.2d at 281 (emphasis added), but in no way "modifies the traditional [c]ommerce [c]lause principles that bar a state from regulating the transport, sale, or use of products outside of its own territory," *id.* Thus, our conclusion that the Connecticut statute acts as a direct regulation of beer pricing in other states sufficiently disposes of this issue. *See Brown-Forman*, 476 U.S. at 585. Moreover, the extraterritorial effect of Connecticut's affirmation provisions, particularly as to volume discounting, "may interfere with the ability of other [s]tates to exercise their own authority under the [t]wenty-first [a]mendment" by impinging upon their "regulatory goals" or by "depriv[ing] their citizens of the opportunity to purchase brands of liquor that are sold" in Connecticut, *id.*

CONCLUSION

In light of the foregoing, we hold that the amended Connecticut beer price affirmation provisions directly regulate interstate commerce in violation of the commerce clause. Accordingly, we reverse the judgment of the district court and remand for entry of judgment in favor of plaintiffs.

FOOTNOTES

[1] As amended by 1984 Conn. Acts 332, § 30-63b(b) provides:

> At the time of posting of the bottle, can, keg or barrel and case price required by section 30-63, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-

(continued)

> of-state shipper of each brand of beer posted certifying that, at the time of posting, the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees is no higher than the lowest price at which each such item of beer is sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

[2] As added by 1984 Conn. Acts 332, § 30-63b(e) provides:

> This section shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any time during the calendar month covered by such posting.

[3] Section 30-63a(b) provides:

> No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer as defined in section 30-1, at a bottle, can or case price, or price per keg, barrel or fractional unit thereof, higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

[4] 1984 Conn. Acts 432 provides in pertinent part:

> In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered during such posted period by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, [only differentials in price attributable to differences in state taxes and to delivery costs are permissible].

[5] A "retroactive" affirmation statute "require[s] prices to an in-state wholesaler to be at the lowest price at which the product was sold elsewhere during an earlier time period." *Brown-Forman Corp. v. New Mexico Dep't of Alco. Bev. Cont.*, 672 F. Supp. 1383, 1385 (D. N.M. 1987). "Prospective" affirmation "uses as its reference point the price for out-of-state sales

(continued)

of liquor in the future." *Id.* A "simultaneous" (also known as "contemporaneous" or "concurrent") affirmation requires that "at *the moment*" of posting or sale the price to the in-state wholesaler "matches the lowest price at which the product is being sold elsewhere." *See id.; see also* Note, *Liquor Price Affirmation Statutes and the Dormant Commerce Clause*, 86 Mich. L. Rev. 186, 190 n.31 (1987) ("Simultaneous statutes . . . represent a subdivision of the prospective category," retaining its "future-price orientation" but allowing "freedom to change [out of state] prices after the schedule's effective month has begun.").

[6] Several courts have found that simultaneous price affirmation statutes directly regulate out-of-state liquor prices in violation of the commerce clause. *See Brown-Forman Corp. v. New Mexico Dep't of Alco. Bev. Cont.*, 672 F. Supp. 1383 (D. N.M. 1987); *Brown-Forman Corp. v. Tennessee Alco. Bev. Comm'n*, No. 3-86-0926, slip op. (M.D. Tenn. June 30, 1987); *Brown-Forman Corp. v. South Carolina Alco. Bev. Comm'n*, 643 F. Supp. 943 (D. S.C. 1986). The affirmation required by these statutes, however, was not simultaneous with posting, but rather with each sale: Brewers were required to affirm that *"at the moment of sale"* the price to the in-state wholesaler "matches the lowest price at which the product is being sold elsewhere," *Brown-Forman*, 672 F. Supp. at 1385. *See Brown-Forman*, slip op. at 2; *Brown-Forman*, 643 F. Supp. at 947.

APPENDIX T

United States Court of Appeals
FOR THE
SECOND CIRCUIT

CONN.
84 CV 816
DORSEY

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of June one thousand nine hundred and eighty-eight.

Present: HON. WILLIAM H. TIMBERS,
HON. GEORGE C. PRATT, [SEAL]
HON. ROGER J. MINER,

Circuit Judges,

THE BEER INSTITUTE (formerly named UNITED STATES BREWERS ASSOCIATION, INC.) as an association, and on behalf of its following members selling beer in the State of Connecticut and the bordering States of Massachusetts, New York, and Rhode Island:

Anheuser-Busch, Inc., Miller Brewing Company, Latrobe Brewing Company, Pabst Brewing Company, The Stroh Brewery Company.

Docket No. 87-7880

ANHEUSER-BUSCH, INC.; G. HEILEMAN BREWING COMPANY; THE GENESEE BREWING COMPANY INC., MILLER BREWING COMPANY; ALL BRAND IMPORTERS, INC.; DRIBECK IMPORTERS, INC., GUINESS-HARP CORP.; LABATT IMPORTERS, INC., MARTLETT IMPORTING COMPANY, INC., MONTEREY BAY COMPANY, INC., and VAN MUNCHING COMPANY, INC.,

Plaintiffs-Appellants, *(continued)*

(continued)

— against —

JOHN F. HEALY and DAVID L. SNYDER, as Commissioners of the Department of Liquor Control; and CHARLES KASMER, as Secretary of the Department of Liquor Control,

Defendants-Appellees,

WINE SPIRITS WHOLESALERS OF CONNECTICUT, INC., as an association, and on behalf of its following members selling alcoholic liquor in the State of Connecticut:

JOHNNY BARTON, INC.; THE BRESCOME DISTRIBUTORS CORPORATION; CONNECTICUT DISTRIBUTORS, INC.; EDER BROS., INC.; GALLO WINE MERCHANTS INC.; ALLAN S. GOODMAN, INC.; and HARTLEY & PARKER LIMITED, INC.,

Intervenors Defendants-Appellees.

ISSUED AS MANDATED: 9-8-88

APPENDIX U

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES BREWERS ASSOCIATION INC. AS ASN ASSOCIATION, ET AL.	)	
vs.	)	CIVIL H-84-816 PCD
JOHN F. HEALY, ET AL.	)	

JUDGMENT

This action having been remanded to the District Court by the U.S. Court of Appeals for the Second Circuit reversing this Court's ruling and ordereding the judgment shall enter for the plaintiffs.

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the plaintiffs in accordance with the Mandate of the U.S. Court of Appeals for the Second Circuit.

Dated at Hartford, Connecticut, this 20th day of September 1988.

KEVIN F. ROWE, Clerk

By /s/ Dennis P. Iavarone

Dennis P. Iavarone
Deputy in Charge

APPENDIX V

UNITED STATES COURT OF APPEALS
FILED
JUN 29 1988
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE BEER INSTITUTE, et al Plaintiffs	:	DOCKET NO. 87-7880
V.	:	
JOHN F. HEALY, et al Defendants	:	JUNE 28, 1988

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that John F. Healy and David L. Snyder, as Commissioner of the Department of Liquor Control, and Charles Kasmer, as Secretary of the Department of Liquor Control, the Defendants above named, hereby appeal to the Supreme Court of the United States from the final order reversing the District Court entered in this action on June 13, 1988.

This appeal is taken pursuant to 28 U.S.C. Sec. 1254(2).

Dated at Hartford, Connecticut, this 28th day of June, 1988.

DEFENDANTS
JOHN F. HEALY, ET AL

JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

/s/ Robert F. Vacchelli

Robert F. Vacchelli
Assistant Attorney General
Counsel of Record for the
Defendant-Appellants
John F. Healy, et al.
(A member of the Bar of the
U.S. Supreme Court)

/s/ Richard M. Sheridan

Richard M. Sheridan
Assistant Attorney General
Office of the Attorney General
MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
Tel: (203) 566-7570

[Proof of Service omitted in printing]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE BEER INSTITUTE, et al Plaintiffs	: :	Docket No. 87-7880
v.	:	
JOHN F. HEALY, et al Defendants	: :	July 5, 1988

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The Wine and Spirits Wholesalers of Connecticut, Inc., as an association and on behalf of its following members selling alcoholic liquor in the State of Connecticut: Johnny Barton, Inc.; the Brescome Distributors Corporation; Connecticut Distributors, Inc.; Eder Bros., Inc.; Gallo Wine Merchants, Inc.; Allan S. Goodman, Inc.; and Hartley & Parker Limited, Inc., Intervenor Defendants in the aforementioned action, hereby appeal to the Supreme Court of the United States from the final order reversing the District Court entered in this action on June 13, 1988.

This appeal is taken pursuant to 28 U.S.C. Sec. 1254 (2).

Dated at Hartford, Connecticut, this 5th day of July, 1988.

INTERVENOR-DEFENDANTS
WINE AND SPIRITS WHOLESALERS
OF CONNECTICUT, INC.

William A. Wechsler
Bailey and Wechsler
66 Forest Street
Hartford, CT. 06105
Tel: (203) 525-9191

[Proof of Service omitted in printing]

APPENDIX W

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

AREA CODE 202
479-3011

November 14, 1988

Robert F. Vacchelli, Esquire
Assistant Attorney General of Connecticut
110 Sherman Street
Hartford, Connecticut 06105

Re: 88-449) – John F. Healy, et al. v. The Beer Institute, et al.
88-513) – Wine and Spirits Wholesalers of Connecticut, Inc.
) v. The Beer Institute, et al.

Dear Mr. Vacchelli:

The Court today entered the following order in the above consolidated cases:

> "In these cases probable jurisdiction is noted. The cases are consolidated and a total of one hour is allotted for oral argument."

Enclosed are memorandums describing the time requirements and procedures under the Rules. Inasmuch as the Court prefers to have the briefs well in advance of the argument, continuances of time to file briefs are not favored.

The additional docketing fee of $100.00 (Rule 45(a)) is now due and payable in No. 88-449.

Very truly yours,

JOSEPH F. SPANIOL, JR., CLERK

/s/ Sandy Nelsen
Sandy Nelson
Assistant Clerk

Enclosures

Supreme Court, U.S.
FILED
DEC 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

(5) (5)

Nos. 88-449, 88-513

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

JOHN F. HEALY, et al.,
Appellants,
v.
THE BEER INSTITUTE, et al.,
Appellees.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.,
Intervenor-Appellants,
v.
THE BEER INSTITUTE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLANTS JOHN F. HEALY, et al.

JOSEPH I. LIEBERMAN
Attorney General
ROBERT F. VACCHELLI
Assistant Attorney General
Counsel of Record
RICHARD M. SHERIDAN
Assistant Attorney General
MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
Telephone: (203) 566-7570

Printed by
Broscia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

QUESTIONS PRESENTED

1. Does Connecticut's beer price affirmation law cause an impermissible extraterritorial effect in violation of the Commerce Clause of the United States Constitution even though it allows beer shippers to change prices in other states "at any time," before and after monthly posting, without requiring such changes to be duplicated in Connecticut?

2. If shippers are not free to change such prices in other states because of regulatory restrictions in those other states, is Connecticut's beer price affirmation law nevertheless a valid exercise of its power to regulate the sale of beer within its borders under the Twenty-first Amendment to the United States Constitution?

PARTIES

The parties in the action are as follows:

Appellants

JOHN F. HEALY and DAVID L. SNYDER, as Commissioners of the Department of Liquor Control; and CHARLES KASMER, as Secretary of the Department of Liquor Control.

Appellees

THE BEER INSTITUTE (formerly named UNITED STATES BREWERS ASSOCIATION, INC.) as an association, and on behalf of its following members selling beer in the States of Massachusetts, New York and Rhode Island:

Anheuser-Busch Inc., Miller Brewing Company, Latrobe Brewing Company, Pabst Brewing Company, The Stroh Brewery Company.

ANHEUSER-BUSCH, INC.; G. HEILEMAN BREWING COMPANY; THE GENESSEE BREWING COMPANY, INC.; MILLER BREWING COMPANY; ALL BRAND IMPORTERS, INC.; DRIBECK IMPORTERS, INC.; GUINESS-HARP CORP.; LABATT IMPORTERS, INC.; MARTLETT IMPORTING COMPANY, INC.; MONTEREY BAY COMPANY, INC.; and VAN MUNCHING COMPANY, INC.

Intervenor-Appellants

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC., as an association, and on behalf of its following members selling alcoholic liquor in the State of Connecticut:

JOHNNY BARTON, INC.; THE BRESCOME DISTRIBUTORS CORPORATION; CONNECTICUT DISTRIBUTORS, INC.; EDER BROS., INC.; GALLO WINE MERCHANTS, INC.; ALLAN S. GOODMAN, INC.; and HARTLEY & PARKER LIMITED, INC.

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Nos. 88-449, 88-513

In The
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OCTOBER TERM, 1988

JOHN F. HEALY, et al.,
Appellants,

v.

THE BEER INSTITUTE, et al.,
Appellees.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.,
Intervenor-Appellants,

v.

THE BEER INSTITUTE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported as *The Beer Institute v. Healy*, 849 F.2d 753 (2nd Cir. 1988) and a copy of the slip opinion appears in the Joint Appendix ("J.A.") at page 189A. The earlier opinion of the United States District Court for the District of Connecticut is reported as *U.S. Brewers Ass'n v. Healy*, 669 F. Supp. 543 (D. Conn. 1987) and a copy of that slip opinion appears in J.A. at p. 165A.

JURISDICTION

The statutory provision on which the jurisdiction of this Court is invoked is 28 U.S.C. Sec. 1254 (2), which provides for a direct appeal to the Supreme Court of the United States by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the United States Constitution.

28 U.S.C. Sec. 2101 (b) provides that such appeal shall be taken within ninety days after the entry of judgment.

The judgment of the United States Court of Appeals for the Second Circuit on review herein was entered on June 13, 1988. J.A. p. 187A. Appellants filed their Notice of Appeal pursuant to Supreme Court Rule 10 on June 29, 1988, J.A. p. 208A, and docketed the case by filing their Jurisdictional Statement pursuant to Supreme Court Rule 12.3 on September 12, 1988. *See* Record. This Court noted probable jurisdiction in the case on November 14, 1988. J.A. p. 212A.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Commerce Clause of the United States Constitution:

The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

U.S. Const., Art. I, Sec. 8, cl. 3

The Twenty-first Amendment to the United States Constitution:

The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const., Amend. XXI, Sec. 2

The Beer Price Affirmation Provisions of the Connecticut Liquor Control Act:

No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer as defined in section 30-1, at a bottle, can or case price, or price per keg, barrel or fractional unit thereof, higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

Conn. Gen. Stat. § 30-63 a(b)[1]

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[1] Conn. Gen. Stat. § 30-63 a(b) was ruled to be repealed by implication in a Declaratory Ruling by the Connecticut Department of Liquor Control. *See Healy II*, 849 F.2d, at 756, J.A. at p. 194A; Declaratory Ruling, J.A. at p. 28A.

At the time of posting of the bottle, can, keg or barrel and case price required by section 30-63, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that, at the time of posting, the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees is no higher than the lowest price at which each such item of beer is sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

Conn. Gen. Stat. § 30-63b(b).

In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered at the time of posting by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any such wholesaler, provided that differentials in price which make only due allowance for differences in state taxes and fees and for the actual cost of delivery are permissible. As used in this section, the term "actual cost of delivery" shall mean those expenses incurred by such manufacturer or our-of-state shipper in delivering the item of beer to the wholesaler from the point of origin to the point of destination, the term "point of origin" shall mean the location which has been established through course of dealing as the geographic location from which the wholesaler has been charged by the manufacturer or out-of-state shipper for costs of transportation, notwithstanding the fact that the item of beer may have been manufactured or bottled at, or shipped from, a different geographic location, the term "point of destination" shall mean the location which has been established through course of dealing as the geographic location at which the wholesaler takes delivery of the item of beer, the term "state taxes and fees" shall mean the excise taxes imposed

or the fees required by any state or the District of Columbia upon or based upon a gallon or liter of such alcohol and spirits or each barrel, or fractional unit thereof, of beer and the term "gallon" shall mean one hundred twenty-eight fluid ounces and the term "liter" shall mean one thousand milliliters and the term "barrel" means not less than twenty-eight nor more than thirty-one gallons. A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes and packages, approved by the department of liquor control, of his brand which he offers to any wholesaler in any state bordering this state.

Conn. Gen. Stat. § 30-63c(b)

The Pricing Provisions Allowing Out-Of-State Changes:

This section shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any time during the calendar month covered by such posting.

Conn. Gen. Stat. § 30-63b(e)

The Posting Provisions of the Connecticut Liquor Control Act:

Each manufacturer, whoesaler and out-of-state shipper permittee shall post with the department, on a monthly basis, the bottle, can and case price, and for beer, the price per keg or barrel or fractional unit thereof, of any brand of goods offered for sale in Connecticut, which price when so posted shall be the controlling price for such manufacturer, wholesaler or out-of-state permittee for the month following such posting. Notice of all manufacturer, wholesaler and out-of-state shipper permittee prices shall be given to permittee purchasers by direct mail or advertising in a trade publication having circulation among the retail permittees except a wholesaler permittee may give such notice by hand delivery.

Conn. Gen. Stat. § 30-63(c)

STATEMENT OF THE CASE

The Appellees (herein referred to as "brewers") are the major producers or importers of beer in the United States. They initiated this lawsuit in response to the enactment by the Connecticut General Assembly in 1984 of certain corrective legislation to the beer price affirmation provisions of the Connecticut Liquor Control Act, 1984 Conn. Pub. Acts Nos. 84-332, 84-432; J.A. at p. 32A and 37A. The original beer price affirmation law was ruled unconstitutional in *United States Brewers Ass'n v. Healy*, 692 F.2d 275 (2nd Cir. 1982) *rev'g* 532 F. Supp. 1312 (D. Conn. 1982) *aff'd* 464 U.S. 909 (1983)(*Healy I*). As was *Healy I*, this case is an action for declaratory judgment and injunctive relief challenging the constitutionality of the beer price affirmation law under the Commerce Clause of the United States Constitution.

The facts in the case have not changed to any significant degree since the ruling in *Healy I*, except that the beer affirmation provisions were significantly amended in 1984. Now, as then, Connecticut has a three-tier system for the distribution of liquor in the general categories of shippers (out-of-state shippers, Conn. Gen. Stat. §§ 30-18, 30-19 and manufacturers, Conn. Gen. Stat. § 30-16), wholesalers (Conn. Gen. Stat. § 30-17) and retailers (Conn. Gen. Stat. § 30-20 *et seq.*). In each category, a license is required, Conn. Gen. Stat. §§ 30-74, 30-77, and, with some exceptions, shippers may only sell to wholesalers, wholesalers may only sell to retailers, and retailers may only sell to consumers. Conn. Gen. Stat. § 30-76. Shippers must give notice to wholesalers of their prices by posting such prices with the Connecticut Department of Liquor Control on a monthly basis. Conn. Gen. Stat. § 30-63(c). Once posted, these prices are controlling for the month following such posting. *Id.* In this system, the brewers are shippers.

Historically, the retail price of beer has been generally higher in Connecticut than in the bordering states of Massachusetts, New York and Rhode Island. *Healy I*, 692 F.2d, at 276. As a consequence, Connecticut residents have crossed

state borders in significant numbers to purchase beer in other states at lower retail prices. *Id.* In 1981 the Connecticut legislature amended the Liquor Control Act by enacting the beer price affirmation laws. Essentially, the law required a brewer to file a sworn affirmation stating that its posted prices *will be no higher* than prices charged in any state bordering Connecticut *during the month covered by posting,* and forbade Connecticut sales in violation of the affirmation. *Healy I,* 692 F.2d, at 277. (Our emphasis.) The purpose of the law was to lower the price of beer in Connecticut, thereby increasing the purchase of beer by Connecticut residents within the state and generating increased tax revenues for the state. *Id.*, at 276.

The 1981 law was found to be violative of the Commerce Clause of the United States Constitution, notwithstanding the fact that there were no in-state beer brewers, because of an extraterritorial thrust. "[T]he obvious effect of the Connecticut statute [was] to control the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a state outside of Connecticut." *Healy I,* 692 F.2d, at 282.

In 1984, the Connecticut General Assembly revised the beer affirmation provisions in several significant respects. First, it narrowed the scope of the affirmation to require that the only time affirmation was effective was "at the time of posting." Public Act 84-332, Sec. 3; J.A. at p.33A. Thus, transactions occurring in other states at other times would not violate the affirmation.[2] Secondly, a new provision was added, codified as Conn. Gen. Stat. § 30-63b(e), which reads:

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[2] To the extent that the legislature neglected to amend Conn. Gen. Stat. § 30-63a(b), which prohibited any Connecticut sales at any time higher than the lowest price offered in the border states, the section was deemed repealed by implication in a Declaratory Ruling of the Department of Liquor Control. *Healy II,* 849 F.2d, at 756, J.A. at p.194A; Declaratory Ruling, J.A. at p. 28A.

> This section [affirmation] shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any time during the calendar month covered by such posting.
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> 1984 Conn. Pub. Acts No. 84-322, Sec. 3; J.A. at p. 35A.

The legislature also clarified some definitions used in the formula for determining the lowest price. 1984 Conn. Pub. Acts No. 84-432, Sec. 1; J.A. at p. 37A. Until it was struck down as unconstitutional by the Court of Appeals, the law had been in effect since 1984. To date, there are no beer brewers located within the State of Connecticut.

The United States District Court for the District of Connecticut upheld the constitutionality of the beer price affirmation law on cross motions for summary judgment. *U.S. Brewers Ass'n v. Healy*, 669 F. Supp. 543 (D. Conn. 1987) (*Healy II*). The brewers appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals found the law to be invalid under the Commerce Clause because of an impermissible extraterritorial effect, and did not decide the issues concerning protectionist legislation or indirect burden on interstate commerce raised therein. *The Beer Institute v. Healy*, 849 F.2d 753 (2nd Cir. 1988) (*Healy II*).

SUMMARY OF ARGUMENT

In its most recent decision on the subject of liquor affirmation laws, this Court found New York's prospective affirmation provisions unconstitutional in *Brown-Forman v. N.Y. State Liquor Authority*, 476 U.S. 573 (1986). New York's law violated the Commerce Clause because it made it illegal for a distiller to reduce its price in other states during the period that its posted price was in effect in New York. *Brown-Forman*, 476 U.S. at 579-580. The Connecticut beer affirmation law before the Court in the instant case was corrected, after having been ruled unconstitutional in *United States Brewers Ass'n v. Healy*, 692 F.2d 275 (2nd Cir. 1982) *rev'g* 532 F. Supp. 1312 (D. Conn. 1982) *aff'd* 464 U.S. 909 (1983) (*Healy I*), with precisely this defect in mind. Under current Connecticut law, brewers must post their price schedule, hold it for the next full month, and affirm that the price *at the time of posting* is no higher than the lowest price offered to wholesalers in the bordering states of New York, Massachusetts and Rhode Island. Conn. Gen. Stat. §§ 30-63, 30-63b(b). Moreover, brewers are permitted to change prices elsewhere "at any time" without violating Connecticut law. Conn. Gen. Stat. § 30-63b(e).

The Court of Appeals for the Second Circuit ruled that the Connecticut law is still unconstitutional because brewers are, in fact, not free to change prices at any time in other states because of regulatory restrictions on price changes in some border states. *The Beer Institute v. Healy*, 849 F.2d 753, 759 (2nd Cir. 1988) *rev'g* 669 F. Supp. 543 (D. Conn. 1987) (*Healy II*). Such matters are clearly outside of Connecticut's control. Connecticut has done all that it can to avoid the extraterritorial effects of its law. If brewers must consider the impact in Connecticut of their pricing decisions in other states, this is not a constitutional injury. As the Court of Appeals for the Sixth Circuit recently ruled in upholding Tennessee's simultaneous affirmation law on distilled spirits, the question is not whether the statute has repercussions elsewhere, but whether it actually undertakes to regulate prices in other states. *Brown-Forman v. Tennessee*, 860 F.2d 1354 (6th Cir.

1988). Any business which chooses to operate in more than one state will face multiple and even inconsistent regulations. The situation in this case is no different and not illegal. Moreover, the Commerce Clause does not protect a brewer from having to think ahead in establishing its pricing strategy. It does not protect any particular method of operation of a business. *CTS Corp. v. Dynamics Corp. of America*, 107 S.Ct. 1637, 1652 (1987).

In *Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966) this Court upheld a retrospective affirmation law, declaring, "The mere fact that [the affirmation law] is geared to appellants' pricing policies in other states is not sufficient to invalidate the statute." *Id.* at 43. While the continuing validity of this particular form of affirmation has been cast in doubt, the Court has not suggested that all forms of affirmation are illegal, only those which regulate prices in other states. This law does not cross that line.

Additionally, Connecticut's law was enacted to solve the social problem of an exodus of residents buying liquor out-of-state, and illegally evading importation and taxation laws. This purpose is valid and useful, and whatever burden, if any, the law imposes on interstate commerce has yet to be proven.

The liquor industry is pervasively regulated due to the volatile nature of the product involved, and, by virtue of the Twenty-first Amendment, regulation is left to the individual states to promulgate in accord with their own policy. Pricing and taxation rules are included in this broad power. Thus, complete uniformity and consistency between the states is not to be expected or desired. By this legislation, Connecticut does not seek to impede the free flow of commerce. It plainly seeks the same fair price for beer as enjoyed by its neighbor states so that its citizens need not caravan across state lines to import their own liquor, completely short-circuiting its licensing and taxation program. This should outweigh whatever interests the brewers have in using Connecticut to subsidize lower prices elsewhere.

ARGUMENT

I. CONNECTICUT'S BEER PRICE AFFIRMATION LAW SPECIFICALLY GUARDS AGAINST CAUSING AN IMPERMISSIBLE EXTRATERRITORIAL EFFECT BY ALLOWING BREWERS TO CHANGE THEIR PRICES IN OTHER STATES "AT ANY TIME," BEFORE AND AFTER MONTHLY POSTING, WITHOUT REQUIRING SUCH CHANGES TO BE DUPLICATED IN CONNECTICUT.

In its most recent decision on the subject of liquor affirmation laws, this Court found New York's prospective affirmation provisions unconstitutional in *Brown-Forman Distillers v. N.Y. State Liquor Authority*, 476 U.S. 573 (1986). The New York law was virtually identical to the Connecticut law struck down in *Healy I* and was found to be unconstitutional for similar reasons. The Court in *Brown-Forman* intimated that a state's attempt to assure the lowest possible prices for its residents was a legitimate goal. *Brown-Forman*, 476 U.S., at 579. However, New York's method was unlawful under the Commerce Clause of the United States Constitution. "While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other states surrender whatever competitive advantages they may possess." *Id.*, at 580; *see also, Baldwin v. G.A.F. Seelig Inc.*, 294 U.S. 511, 528 (1935). New York's law was unlawful because "New York makes it illegal for a distiller to reduce its price in other states during the period that the posted price is in effect." *Brown-Forman*, 476 U.S., at 579–580.

The Connecticut statute was corrected in 1984 with precisely this constitutional deficiency in mind. *Healy II*, 849 F.2d, at 755; J.A. at p. 193A. Under current Connecticut law, brewers must post their price schedule, hold it for the next full month, and affirm that the price *at the time of posting*[3]

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[3] By regulation, posting occurs on the sixth day of each month at 10 a.m. *See* 7 Reg. Conn. Agencies, Liquor Cont. Sec. 30-6-B4a (1985). Copy reprinted in J.A. at p. 157A.

is no higher than the lowest price offered to wholesalers in other states bordering Connecticut. Conn. Gen. Stat. §§ 30-63, 30-63b(b). Since posting occurs at a moment in time, it is clear that Connecticut law does not track any time span and thus does not deter price changes by brewers during any time span. Moreover, Conn. Gen. Stat. § 30-63b(e), a new provision added in 1984 Conn. Pub. Acts. No. 84-332, provides:

> This section [affirmation] shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any time during the calendar month covered by such posting.
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> J.A. at p. 35A.

Clearly, then, a price change by a brewer in another state cannot constitute a violation of Connecticut law, and brewers are free to change their prices in other states at any time. This eliminates the extraterritorial effect identified in *Brown-Forman* and *Healy I*. Indeed, Plaintiffs, in the trial court below, withdrew argument on the point. *Healy II*, 669 F. Supp., at 548; J.A. at p. 172A.

Nevertheless, the brewers advocated, and the Court of Appeals ruled, that the impermissible extraterritorial effect remains apparent on its face because brewers are in fact not free to change prices[4] in other states because of regulatory

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[4] The Court of Appeals also found an impermissible extraterritorial effect to exist where Connecticut requires brewers to pass along to Connecticut any volume discounts offered in the border states at the time of posting. *Healy II*, 849 F.2d, at 760; J.A. at p. 200A. Indeed, any such inducements must be included in determining the lowest price being offered in the border states. Conn. Gen. Stat. § 30-63c(b); J.A. at p. 36A. Inasmuch as the reasoning finding Connecticut's examination of such inducements to be a

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restrictions in those other states. Citing the monthly price hold laws in Massachusetts, 138 M.G.L.A. Sec. 25 B(d), and the 180-day hold on price reductions mandated by New York law, N.Y. Alco. Bev. Cont. Law Sec. 55-b(2) (McKinney 1987),[5] the court found that brewers must still look ahead to consider the impact of their pricing decisions on Connecticut when making pricing decisions in Massachusetts and New York. *Healy II*, 849 F.2d, at 759; J.A. at p. 198A.

It is well settled that the practical effect is the critical consideration in determining whether a statute escapes its borders to control liquor prices in other states. *Brown-Forman*, 476 U.S., at 583 *citing Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945). However, in this case, Connecticut has done all that it can to remove the extraterritorial effect of its legislation. It does not bar, deter or delay price decisions in other states. It specifically leaves brewers free to select their own price levels in those other states. The fact that there are regulatory restrictions on price changes in other states is a matter outside of Connecticut's control. Connecticut has done all that it can do to avoid interference with pricing decisions in other states, while still referencing those prices.

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[4] *(continued)*
violation of the Commerce Clause is identical to that involved in testing whether Connecticut may gear its affirmation statute to the brewers' pricing policies in other states, the defenses asserted with respect to price examination are equally applicable to inducement examination. Only price examination is discussed in this brief. However, inducement examination is also valid for the same reasons. Our restraint in not duplicating the argument is for the sake of brevity, and should not be construed as a waiver.

[5] Administrative exemptions are available in both states. *See* 138 M.G.L.A. Sec. 25 B(d); N.Y. Alco. Bev. Cont. Law Sec. 55-b(4)(c). Also, brewers may avoid affirmation consequences in Connecticut by not selling for one month or more. *See Healy I*, 532 F. Supp., at 1317. The Court will not assume that governments will permit these measures to solve any constitutional problems in a statute. *Brown-Forman*, 476 U.S., at 582 n.5. However, they should not be ignored, especially here where the Court emphasizes the practical effects.

The Court of Appeals analogized to several Commerce Clause cases involving the transportation industry in finding authority to condemn the interaction of Connecticut's liquor law with the laws of Massachusetts and New York. *See, Healy II*, 849 F.2d at 758; J.A. at p. 197A. This focus is misplaced. Connecticut's affirmation law is not at all like the trailer truck and train laws struck down for obfuscating the transportation industry. Here there is no obvious, practical necessity for a single body, having nationwide authority, to prescribe uniform distribution and trade practice rules as in the transportaiton industry. *Cf. Southern Pacific Co. v. Arizona*, 325 U.S., at 776. To the contrary, in the liquor industry, each state is authorized by the Twenty-first Amendment to design its own distribution system, and the differences are stark. Such authorization to be different is the hallmark of the Twenty-first Amendment. This Amendment grants the states "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 110 (1980); *see also, Heublein Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 283 (1972).

Certainly, Connecticut cannot regulate activity beyond its borders, but this affirmation law does not purport to extend its regulatory arm across that line, and it does not unintentionally so extend either. Assuming that affirmation causes brewers to consider what impact their pricing decisions in New York or Massachusetts will have in Connecticut, this is a circumstance which would exist whether or not Connecticut has an affirmation law. Also, it is a fact of life for any business organization which chooses to operate in more than one state that it will be subject to multiple and even inconsistent regulations and any such business must simply be prepared to conform its various local operations to more than one set of laws. Regan, *Siamese Essays*, 85 Mich. L.Rev. 1865, 1881 (1987). This is especially true when the party is involved in a pervasively regulated industry. *See, e.g., Energy Reserves Group, Inc. v. Kansas Power & Light*, 459 U.S. 400, 413 (1983); *Beer Co. v. Massachusetts*, 97 U.S. 25, 32 (1877); *Schieffelin v.*

Department of Liquor Control, 194 Conn. 165, 181, 479 A.2d 1191 (1984) (Contracts not impaired by shifting regulatory demands). The question is ". . . not whether the [affirmation] statute has 'repercussions' on liquor prices in other states, but whether [it] has actually undertaken to 'regulate' liquor prices in other states." *Brown-Forman v. Tennessee*, 860 F.2d 1354, ____ (6th Cir. 1988) (Simultaneous affirmation law upheld). Connecticut's law was specifically corrected to avoid such direct regulation. Even in transportation cases, where the challenger can point to no conflicting requirements of other governments, the dormant Commerce Clause challenge is dismissable. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 448 (1960). No conflicting regulatory requirements are present in this case. Connecticut does not mandate price changes in other states; it only permits such changes.

Moreover, the Commerce Clause does not protect a brewer from having to think ahead in establishing its pricing strategy. It does not protect any particular method of operation of a business. *CTS Corp. v. Dynamics Corp. of America*, 107 S.Ct. 1637, 1652 (1987). It protects interstate markets. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978). No interstate markets are imperiled in this case.

In *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), this Court upheld a retrospective affirmation law declaring, "The mere fact that [the affirmation statute] is geared to pricing policies in other states is not sufficient to invalidate the statute." *Id.* at 43. Connecticut's law is geared to the brewers' pricing policies in other states, nothing more. While the continuing validity of retrospective affirmation laws has been cast in doubt,[6] this Court has not suggested that all forms of

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[6] In considering the continuing validity of the *Seagram* decision, this Court in *Brown-Forman* noted:

> While we hold that New York's prospective price affirmation statute violates the Commerce Clause, we do not necessarily attach

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affirmation are unconstitutional.[7] Indeed, the Court declined to take original jurisdiction in a challenge against all affirmation provisions in all the states which have such requirements. *Pennsylvania v. Alabama*, 472 U.S. 1015 (1985) (Motion for leave to file complaint denied). Significantly, affirmation laws are still being enforced or defended in court in eight license states,[8] and it exists in contract requirements in seventeen control states.[9] The corrected affirmation law promulgated by the Connecticut General Assembly squarely and successfully addresses the impermissible extraterritorial effect deficiency identified by the Court in *Brown-Forman* and *Healy I*, and we urge this Court to uphold the law on this ground accordingly.

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[6] *(continued)*

> constitutional significance to the difference between a prospective statute and the retrospective statute at issue in *Seagram*. Indeed, one could argue that the effects of the statute in *Seagram* do not differ markedly from the effects of the statute at issue in the present case. If there is a conflict between today's decision and the *Seagram* decision, however, there will be time enough to address that conflict should a case arise involving a retrospective statute. Because no such statute is before us now, we need not consider the continuing validity of *Seagram*.

Brown-Forman, 476 U.S., at 584 n.6.

[7] However, the *Brown-Forman* decision was cited as authority for striking down several "simultaneous" affirmation provisions in other states: *Brown-Forman Corp. v. Delaware Alcoholic Beverage Control Comm'n*, No. 87-20 LON, slip op. (D. Del. Dec. 17, 1987); *Brown-Forman Corp. v. New Mexico Dep't of Alcoholic Beverage Comm'n*, 672 F. Supp. 1383 (D.N.M. 1987); *Brown-Forman Distillers Corp. v. South Carolina Alcoholic Beverage Control Comm'n*, 643 F. Supp. 943 (D.S.C. 1986); *but see, Brown-Forman v. Tennessee*, 860 F.2d 1354 (1988).

[8] Arizona, Ariz. Rev. Stat. Ann. Sec. 4-253(A) (Supp. 1986); California, Cal. Bus & Prof. Code Sec. 23673 (West, 1985); Connecticut, *supra;* Florida, Fla. Stat. Sec. 565.15(1) (1985); Georgia, Ga. Comp. R & Regs. r. 560-2-3-.47 (1982); Oklahoma, Okla. Stat. Ann. tit. 37, Sec. 536.1 (West Sup. 1987); Rhode Island, R.I. Gen. Laws Sec. 3-6-14.1 (1987) and Tennessee, Tenn. Code Ann. Sec. 57-3-202(e) (1)-(3) (1980). In "license" states, the sale of liquor is conducted by private industry subject to state regulation. Connecticut is the only license state with an affirmation law covering beer.

[9] Alabama, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, West Virginia, and Wyoming. Nat'l Alc. Bev. Cont. Ass'n, Price Affirmation Compilation, at p. 11 (1987). In "control" states, the sale of liquor is conducted by the government.

II. THE AFFIRMATION LAW DOES NOT OTHERWISE CONSTITUTE PROTECTIONIST LEGISLATION, NOR DOES IT IMPOSE AN INDIRECT BURDEN ON INTERSTATE COMMERCE.

The *Brown-Forman* decision summed up the two-tiered approach to analyzing state economic regulation under the Commerce Clause as follows:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry . . . . When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Brown-Forman, 476 U.S. at 579 (Citations omitted).

The issue of direct regulation of interstate commerce has already been discussed above in the context of extraterritorial effect. The Court of Appeals found it unnecessary to reach the issues of discrimination (which has been called "economic protectionism") *Healy II*, 849 F.2d, at 758, J.A. at p. 196A, and indirect burden on interstate commerce; however, this Court noted probable jurisdiction over these issues in the companion case of *Wine and Spirits Wholesalers of Connecticut, Inc. v. The Beer Institute*, No. 88-513, and these issues are discussed *seriatim*:

Economic Protectionism

It is clear that this form of regulation is "virtually per se" unconstitutional under the Commerce Clause. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925); *see also, Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982); *but see, New Energy Co. of Indiana v. Limbach*, 108 S.Ct. 1803, 1810 (1988) (Possible exceptions listed). A finding that state legislation constitutes economic protectionism may be made on the basis of either

discriminatory purpose or effect. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984). There is evidence of neither in the instant case.

Considering the purpose of a law, it has been held that discriminatory state statutes enacted for protectionist purposes will be invalidated. *Bacchus, Id., citing Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 352–53 (1977). The brewers may selectively cull passages from the legislative debates to contend that the purpose of the 1981 or 1984 law was to protect Connecticut business from out-of-state competition. However, the purpose of the original beer price affirmation law, enacted in 1981 Conn. Pub. Acts. No. 81-294, was to lower the retail price of beer in Connecticut, thereby increasing the purchase of beer by Connecticut residents within the state and generating increased tax revenues for the state. *Healy I*, 692 F.2d, at 276 *citing trial court decision*, 532 F. Supp., at 1316–17. The trial court in *Healy I* thus found: "Because neither the statute nor the legislative debates reveal an avowed purpose to discriminate against out-of-state businesses, the statute cannot be invalidated on the basis of its purpose alone" *Healy I*, 532 F. Supp., at 1323. This finding was not disturbed on appeal. *See*, 692 F.2d, at 281, n.11. Even if the matter can be relitigated now, it is clear that Connecticut's purpose is valid. A state may seek lower prices for its consumers. *Brown-Forman*, 476 U.S., at 580. It has every right to "protect its residents' pocketbooks." *Philadelphia v. New Jersey*, 437 U.S., at 626. Regulations designed to assure "a fair price and a responsible purchaser" are assumed to be valid. *Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 530 (1949). This legislation is of like purpose.

Nor is the purpose of the 1984 legislative action invalid. The declared purpose of 1984 Conn. Pub. Acts Nos. 84-332, 84-432 was to remedy the constitutional problems found by the Court of Appeals and affirmed by this Court in *Healy I*. *Healy I*, 849 F.2d, at 755; J.A. at p. 193A. There is certainly no unconstitutional purpose here.

Considering the effect of the law, it is clear that Connecticut cannot cause producers or consumers in other states to surrender whatever competitive advantages they may possess. *Brown-Forman*, 476 U.S. at 580. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition. *Baldwin v. G.A.F. Seelig Inc.*, 294 U.S., at 523. In the instant case, Connecticut does not discriminate in favor of in-state brewers. There are no in-state brewers. *Healy II*, 849 F.2d, at 755; J.A. at p. 192A. No violation of the Commerce Clause exists here. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72 (1981).

Nevertheless, the brewers advocate that the law works a protectionist effect by equalizing prices at the wholesale level between Connecticut and its neighbors, thereby negating the competitive advantage of business in neighboring states relative to Connecticut businesses. In this regard, they are claiming discrimination not against themselves, but to the ability of Massachusetts, New York and Rhode Island retailers to sell liquor at cheaper rates than Connecticut retailers. Such retailers have been conspicuously absent in this litigation.[10] Moreover, Connecticut is not seeking a competitive advantage over other states for its industry or consumers. *Cf., Bacchus Importers Ltd. v. Dias*, 468 U.S. at 273. It seeks to end a history of price discrimination which has caused its consumers to cross state borders in significant numbers to purchase beer at lower retail prices elsewhere encouraging violation of personal importation laws. Conn. Gen. Stat. § 12-436. In the past this Court has found no Commerce Clause violation where non-discriminatory regulations

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[10]Plaintiffs do not have standing to raise a retailer's or consumer's claim. They sell only to wholesalers. Conn. Gen. Stat. §§ 30-18, 30-19. "[A] plaintiff must generally assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interest of third parties . . . . *Warth v. Seldin*, 422 U.S. 490, 499 (1975). This is especially true in cases such as the instant case, where Plaintiffs' interests are antagonistic to the interests of retailers and consumers. *See, Barrows v. Jackson*, 346 U.S. 249, 256-57 (1953).

protected local residents from deceptive or socially repugnant trade practices. *See, e.g., Breard v. Alexandria*, 341 U.S. 622 (1951) (restrictions on solicitors); *California v. Thompson*, 313 U.S. 109 (1941) (Fraud in the sale of automobile tours). We urge it to rule likewise in the instant case.

In measuring the effect of the law, the touchstone principle is that the Commerce Clause protects interstate markets, not particular interstate firms or their particular structure or methods of operation. *Exxon v. Maryland*, 437 U.S., at 127-28. The law in the instant case applies to all brewers. "[A] non-discriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S., at 474. Even the brewers do not suggest that the beer selling market has shifted in this sense. Therefore, no impermissible effect is worked by Connecticut's beer price affirmation law. Connecticut here is not seeking to keep prices artificially high to protect local producers, as in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) or *Baldwin v. G.A.F. Seelig, Inc., supra*. Also, as the *Seagram* court noted, it is by no means clear that this law must inevitably produce higher prices in other states rather than the lower prices sought for Connecticut. By this law, Connecticut seeks the same fair price as the brewers deliver to Massachusetts, New York and Rhode Island. This is hardly contrary to the provisions of the Commerce Clause.

Indirect Burden on Interstate Commerce

Under this portion of the Commerce Clause test, the Court is called upon to weigh the State's interest at stake in the law and its local benefits against the burdens on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S., at 142. That the State's interest in obtaining the best prices for its consumers is legitimate is well-settled and cited earlier. The local benefits

are obvious. Any burden on the interstate commerce in beer has yet to be established.

Affirmations have been in effect in this country since the Des Moines Warranty of 1937, the simultaneous affirmation contract provision requiring sales of spirits to control states to be no higher than the lowest offered anywhere else in the country. *See,* de Ganahal, *Trade Practice and Beverage Control in the Alcoholic Beverage Industry,* 7 Law & Contemp. Prob. 664, 677 (1940). The license states commenced promulgating legislation on the subject with New York's 1964 retrospective affirmation provisions upheld in the *Seagram* case. The Court in that case reserved decision on whether affirmation "could ever constitute so grave an interference with a company's operations elsewhere as to make the regulations invalid under the Commerce Clause." *Seagram,* 384 U.S., at 42–43. After twenty years of experience with New York's affirmation law, this Court eventually found its modern prospective affirmation law unconstitutional under the Commerce Clause not under the *Pike v. Bruce Church, Inc.* test, but because of its impermissible extraterritorial effects. *Brown-Forman,* 476 U.S., at 581. Likewise, in the instant case, no court has ever struck down Connecticut's affirmation law as an indirect burden on interstate commerce. The earlier, prospective version was tested by the trial court in *Healy I* and no impermissible burden was found. 532 F. Supp., at 1327. This finding was not disturbed on appeal, *Healy I,* 692 F.2d, at 282, although the statute fell for impermissible extraterritorial effects. The present version was tested in *Healy II* and again no impermissible, indirect burden was found. 669 F. Supp., at 543. Again, this finding was not disturbed on appeal, 849 F.2d, at 758, nor should it be. *See, Maine v. Taylor,* 447 U.S. 131, 145 (1986). Understandably, the Court of Appeals did not even address the brewers' claim that the case was not ripe for summary judgment on the issue. *See* Brewer's Appellate Brief, pp. 33–36, Record; State's Appellate Brief, pp. 27–31, Record. The brewers have had time enough to prove whether this law works a material and adverse effect on interstate commerce and they failed to make a sufficient showing on the

essential elements of their case on which they have the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Connecticut has successfully removed the extraterritorial effects of its affirmation law by allowing beer shippers to change prices in other states at any time, before and after posting, without requiring such changes to be duplicated in Connecticut. The law is not otherwise protectionist, nor an indirect burden on interstate commerce. There can be no doubt as to its constitutionality under the Commerce Clause.

III. EVEN IF SHIPPERS ARE NOT FREE TO LOWER SUCH PRICES IN OTHER STATES BECAUSE OF REGULATORY RESTRICTIONS IN SUCH OTHER STATES, THE AFFIRMATION LAW REMAINS A VALID EXERCISE OF CONNECTICUT'S TWENTY-FIRST AMENDMENT POWER.

The States are the depositories of broad power under Sec. 2 of the Twenty-first Amendment to the United States Constitution to regulate the importation and use of intoxicating liquor within their borders. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939). This section grants the states "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Liquor Dealers v. Midcal Aluminum*, 445 U.S., at 110. It certainly does not repeal the Commerce Clause, but the Amendment created an exception to the normal operation of the Commerce Clause. *Craig v. Boren*, 429 U.S. 190, 206 (1976). Indeed, it has been explained that when the interests implicated by a state liquor regulation are so closely related to the powers reserved by the Twenty-first Amendment, the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policy. *Bacchus Importers, Ltd. v. Dias*, 468 U.S., at 276; *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984). A "core power" of the states under the Twenty-first Amendment is the

regulation of the sale or use of liquor within their borders. *Id.* at 713. In cases of conflict, the Court engages in a "pragmatic effort to harmonize state and federal powers" within the context of the issues and interests at stake in each case. *Ibid.* at 714.

As already demonstrated, the beer price affirmation law does not transgress the territorial limitations imposed by the Commerce Clause and is not otherwise protectionist or an indirect burden on interstate commerce. Thus, "the action is not within that domain which the Constitution forbids." *Seagram*, 384 U.S., at 43. Assuming, *arguendo*, that there is a constitutional conflict in the present system because brewers are not free to change prices in other states because of restrictions in those states, it is clear that Connecticut in this case has exercised a core power of the Twenty-first Amendment. It is directly regulating the sale or use of liquor within its borders. With each state entitled to regulate liquor in accord with its own policies, complete uniformity is not to be expected or desired.

Connecticut has enacted, over the past 55 years, a pervasive regulatory system guiding the traffic of liquor within its borders, detailing who can sell what, to whom, when and where and for how much. *See, generally,* Brennan, *Liquor Control*, 54 Conn. B.J. 611 (1980). The State considers protection against overcharge as one of its duties in liquor control. Conn. Gen. Stat. § 30-6. This system promotes the valid state purpose of maintaining an orderly business environment conducive of the lawful commerce in liquor. *Schwartz v. Kelly*, 140 Conn. 176, 180, 99 A.2d 89 (1953), *app. dismissed* 346 U.S. 891 (1954). From this commerce the State derives tax revenue. This system is weakened and rendered ineffective when the State's consumers find it worthwhile to caravan across state lines to illegally[11] import their own liquor, completely short-circuiting an entire state licensing and taxation program.

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[11] Personal importation proscriptions are codified in Conn. Gen. Stat. § 12-436.

As noted earlier, Connecticut, in this legislation, does not seek to protect local businesses from competition by keeping prices artificially high, as in *Pike v. Bruce Church, Inc., supra*, or *Baldwin v. G.A.F. Seelig, Inc., supra*. The statute mandates only that Connecticut wholesalers be treated as well as out-of-state wholesalers. This can hardly be characterized as contrary to the policies of the Commerce Clause.

When a state acts as a market participant, it is free to favor its own citizens. *See, Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976). Affirmation is mandated in the control states. *See*, footnote 9, *supra*. To outlaw an even-handed and narrowly drafted affirmation law in this license state, merely because the State is not a market participant, emphasizes form over substance. Connecticut should not be required to dismantle its private industry and become a control state to obtain the same fair price for beer as other states enjoy.

A state effort to monitor the traffic in liquor within its jurisdiction and to control its price and taxation is a direct exercise of Twenty-first Amendment powers. *Cf. United States v. Mississippi Tax Comm'n*, 412 U.S. 363 (1973) *after remand* 421 U.S. 599 (1975); *but see, 324 Liquor Corp. v. Duffy*, 107 S.Ct. 720 (1987) (Interest in minimum mark-up unsubstantiated). Whatever interference this may work against the brewers' interest in forcing Connecticut citizens to subsidize lower prices elsewhere is certainly entitled to no weight.

All state laws enjoy a presumption of validity. Liquor laws, by virtue of the Twenty-first Amendment, enjoy an added presumption of validity. *California v. LaRue*, 409 U.S. 109, 118 (1972). This law, as amended, is a valid exercise of that power, and is entitled to continued enforcement unless and until a specific and unquestionably clear example of constitutional abuse is proven. Such has not been demonstrated in this case.

CONCLUSION

For all the foregoing reasons, we urge the Court to order the judgment of the United States Court of Appeals for the Second Circuit be reversed, and the case remanded with instructions to enter judgment for the Appellants.

Respectfully submitted,

JOHN F. HEALY, et al.

JOSEPH I. LIEBERMAN
Attorney General

ROBERT F. VACCHELLI
Assistant Attorney General
Counsel of Record

RICHARD M. SHERIDAN
Assistant Attorney General

MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
(203) 566-7570

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Nos. 88-449, 88-513

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

JOHN F. HEALY, et al.,
Appellants,
v.
THE BEER INSTITUTE, et al.,
Appellees.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.,
Appellants,
v.
THE BEER INSTITUTE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLANTS WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.

WILLIAM A. WECHSLER
BAILEY AND WECHSLER
Counsel of Record
(A Member of the Bar of
the U.S. Supreme Court)
ALFRED F. WECHSLER
GREGORY J. SOUTHWORTH
BAILEY AND WECHSLER
Counsel of Record
66 Forest Street
Hartford, CT 06105
TELEPHONE: (203) 525-9191

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QUESTIONS PRESENTED

1. Does the Twenty-First Amendment to the U.S. Constitution sanction the State of Connecticut's Liquor Control Act including its amended beer affirmation provisions?

2. Are Connecticut's amended beer affirmation provisions constitutional, on their face and as applied, under the Commerce Clause of the U.S. Constitution?

3. Does the Connecticut beer affirmation statute prevent arbitrary price discrimination by legislating equitable pricing policies within the State of Connecticut in harmony with both the Twenty-First Amendment and Commerce Clause of the U.S. Constitution?

PARTIES

The parties in this action are as follows:

Appellants

JOHN F. HEALY and DAVID L. SNYDER, as Commissioners of the Department of Liquor Control; and CHARLES KASMER, as Secretary of the Department of Liquor Control.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC., as an association, and on behalf of its following members selling alcoholic liquor in the State of Connecticut:

JOHNNY BARTON, INC.; THE BRESCOME DISTRIBUTORS CORPORATION; CONNECTICUT DISTRIBUTORS, INC.; EDER BROS., INC.; GALLO WINE MERCHANTS INC.; ALLAN S. GOODMAN, INC.; and HARTLEY & PARKER LIMITED, INC.

Appellees

THE BEER INSTITUTE (formerly named UNITED STATES BREWERS ASSOCIATION, INC.) as an association, and on behalf of its following members selling beer in the States of Massachusetts, New York and Rhode Island:

Anheuser-Busch Inc., Miller Brewing Company, Latrobe Brewing Company, Pabst Brewing Company, The Stroh Brewery Company.

ANHEUSER-BUSCH, INC.; G. HEILEMAN BREWING COMPANY; THE GENESEE BREWING COMPANY, INC.; MILLER BREWING COMPANY; ALL BRAND IMPORTERS, INC.; DRIBECK IMPORTERS, INC.; GUINESS-HARP CORP.; LABATT IMPORTERS, INC.; MARTLETT IMPORTING COMPANY, INC.; MONTEREY BAY COMPANY, INC.; and VAN MUNCHING COMPANY, INC.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported in ____ F.2d ____. The earlier opinion of the United States District Court for the District of Connecticut is reported in 669 F. Supp. 543.

JURISDICTION

This case is an appeal from a judgment of the United States Court of Appeals for the Second Circuit entered on June 13, 1988, which reversed the Ruling and Final Judgment of the United States District Court for the District of Connecticut dated September 15, 1987. The District Court had granted, pursuant to Fed.R.Civ. 56, Appellants' Motion for Summary Judgment, and had denied Appellees' Cross-Motion for Summary Judgment, by holding that the Connecticut beer price affirmation provisions contained within the Connecticut Liquor Control Act, Conn. Gen. Stat. Sections 30-63a(b), 30-63(b) and 30-63c(b), do not violate the Commerce Clause of the United States Constitution, U.S. Const. Art. I, Section 8, cl 3.

On Appeal, the United States Court of Appeals for the Second Circuit reversed and remanded the matter on June 13, 1988, finding that the Connecticut beer price affirmation statute, on its face, violated the Commerce Clause of the United States Constitution. A Notice of Appeal was filed by Appellants Wine and Spirits Wholesalers of Connecticut, Inc. in the U.S. Court of Appeals in New York, New York, on July 7, 1988. A copy of this Notice is attached hereto in Appendix C at page ____.

The jurisdiction of the Supreme Court to hear this case on direct appeal rests upon 28 U.S.C. Sec. 1254 (2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .

U.S. Const., Art. I, Sec. 8, cl. 3

THE TWENTY-FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION:

The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const., Amend. XXI, Sec. 2

THE BEER PRICE AFFIRMATION PROVISIONS OF THE CONNECTICUT LIQUOR CONTROL ACT:

No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer as defined in section 30-1, at a bottle, can or case price, or price per keg, barrel or fractional unit thereof, higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

Conn. Gen. State. Sec. 30-63a(b)[1]

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[1]Conn. Gen. Stats Section 30-63a(b) was ruled to be repealed by implication in a Declaratory Ruling by the Connecticut Department of Liquor Control. See Healy II, ____F.2d____, App. A, p. ____.

At the time of posting of the bottle, can, keg or barrel and case price required by section 30-63, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the Department of Liquor Control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that, at the time of posting, the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees is no higher than the lowest price at which each such item of beer is sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

Conn. Gen. Stat. Section 30-63b(b)

In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered at the time of posting by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any such wholesaler; provided that differentials in price which make only due allowance for differences in state taxes and fees and for the actual cost of delivery are permissible. As used in this section, the term "actual cost of delivery" shall mean those expenses incurred by such manufacturer or out-of-state shipper in delivering the item of beer to the wholesaler from the point of origin to the point of destination, the term "point of origin" shall mean the location which has been established through course of dealing as the geographic location from which the wholesaler has been charged by the manufacturer or out-of-state shipper for costs of transportation, notwithstanding the fact that the item of beer may have been manufactured or bottled at, or shipped from, a different geographic location, the term "point of destination" shall mean the location which has been established through course of dealing as the geographic location at which the

wholesaler takes delivery of the item of beer, the term "state taxes and fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon a gallon or liter of such alcohol and spirits of each barrel, or fractional unit thereof, of beer and the term "gallon" shall mean one hundred twenty-eight fluid ounces and term "liter" shall mean one thousand milliliters and the term "barrel" means not less than twenty-eight nor more than thirty-one gallons. A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes and packages, approved by the Department of Liquor Control, of his brand which he offers to any wholesaler in any state bordering this state.

Conn. Gen. Stat. Section 30-63c(b)

THE PRICING PROVISIONS ALLOWING OUT-OF-STATE CHANGES:

This section shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any time during the calendar month covered by such posting.

Conn. Gen. Stat. Section 30-63b(e)

THE POSTING PROVISIONS OF THE CONNECTICUT LIQUOR CONTROL ACT:

Each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department, on a monthly basis, the bottle, can and case price, and for beer, the price per keg or barrel or fractional unit thereof, of any brand of goods offered for sale in Connecticut, which price when so posted

shall be the controlling price for such manufacturer, wholesaler or out-of-state permittee for the month following such posting. Notice of all manufacturer, wholesaler and out-of-state shipper permittee prices shall be given to permittee purchasers by direct mail or advertising in a trade publication having circulation among the retail permittees except a wholesaler permittee may give such notice by hand delivery.

Conn. Gen. State. Section 30-63(c)

STATEMENT OF CASE

This case involves Appellees' challenge of the constitutionality of certain price affirmation provisions of the State of Connecticut's Liquor Control Act. Appellees are collectively both a trade association now known as the Beer Institute (an industry-wide association of thirty-nine domestic brewers and twenty-three importers of beer, formerly the United States Brewers Association, Inc.), and individual brewers and importers, some of whom are licensed as out-of-state shippers to sell beer to wholesalers in the State of Connecticut. Appellants are Commissioners and the Secretary of the Connecticut Department of Liquor Control and the Wine & Spirits Wholesalers of Connecticut, Inc., an association of seven companies that are licensed to sell alcoholic liquor on a wholesale basis in the State of Connecticut.

The beer price affirmation provisions of the State of Connecticut Liquor Control Act, Conn. Gen. Stat. Sections 30-63a(b), 30-63b(b), and 30-63c(b) were first enacted by the Connecticut General Assembly in 1981 in Public Act 81-294. In 1984, the Connecticut General Assembly amended the State's beer price affirmation provisions in Public Acts 84-332 and 84-432. The declared purpose and ultimate result of Public Act 84-332 was to conform Connecticut's beer price affirmation provisions to the U.S. Supreme Court standard as enunciated in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 284 U.S. 35 (1966), and as modified by the U.S. Court of Appeals Second Circuit's decision in *U.S. Brewers Association v. Healy*, 692 F.2nd 275 (2d Cir. 1982), affirmed per curiam 464 U.S. 909, (1983) (hereinafter, "*Healy I*").

Rather than requiring out-of-state brewers and importers to certify that their prices "will be" no lower in any of the border states during the month following the posting of prices in Connecticut, the new statute simply requires that at the time of posting the "prices charged to Connecticut wholesalers are *no higher than the lowest price then being charged in any border state*". [emphasis added] *Healy II* at 547.

The Commissioners of Connecticut's Department of Liquor Control, by affidavit and Declaratory Ruling issued pursuant to Conn. Gen. Stat. Section 4-176, have further restricted the State's beer affirmation provisions. The Ruling made clear that whatever the interpretation of Section 30-63a(b), out-of-state shippers, in this case brewers, need only affirm that at the time of posting in Connecticut (and *only* at the time of posting), their prices to Connecticut wholesalers are no higher than in the border states.

The beer industry in Connecticut consists of three marketing levels: (1) brewers and importers; (2) wholesalers; and (3) retailers. A participant at any of the levels must hold a valid Connecticut license to sell within the State alcoholic beverages to the tier below, and ultimately to the consumers. *Healy II* at 545-46.

Appellee licensees have contended that prices charged in package configurations offered to wholesalers in Connecticut and the bordering states vary in the several markets in Connecticut and its three bordering states. However, realistically with respect to interstate "competition," in practice there is no appropriate vehicle for a wholesaler in one state to compete against a wholesaler in another state due to the nature of the national liquor distribution system under the Twenty-First Amendment and more particularly the three-tier system established independently by Connecticut and its three border states.

Moreover, Connecticut retailers, particularly near its borders, face substantial competition from retail beer outlets in the bordering states. Prices charged to Connecticut wholesalers are neither the highest nor the lowest in the four-state region. Nevertheless, as a result of higher wholesale prices, retail prices have been historically higher in Connecticut and many Connecticut residents have therefore purchased beer at lower retail prices by travelling to New York, Massachusetts or Rhode Island. *Healy II* at 546.

Beer sales in the states bordering Connecticut are regulated differently, although no less stringently, than those in Connecticut. Although there has been no evidence or argument in any of the three proceedings previously brought by Appellees relative to the comparative stringency of liquor laws in Connecticut as opposed to its bordering states, there are certain provisions in the border states that are considerably more stringent than similar provisions in Connecticut.

The fact that those licensees who choose to do business in any of the fifty states under the Twenty-First Amendment must conform to the criteria established to become a licensee in each state is the backdrop against which this litigation has proceeded. Connecticut's affirmation provisions are significantly less restrictive than those in so-called "control states" where the state is in charge of importation, wholesaling, establishment of prices and distribution. Moreover, the sale of alcoholic liquors under the Twenty-First Amendment is a privilege and not a right. Court of Appeals in *Healy I.*

On July 25, 1984, Appellees filed a challenge in the United States District Court for the District of Connecticut to contest certain provisions of Connecticut's Liquor Control Act as revised by the state legislature in accordance with the decision in *Healy I.* In their complaint, Appellees alleged that the statute violated the Commerce Clause.

On August 30, 1984, Appellants answered and filed a Motion for Summary Judgment, noting that the revised Connecticut statute was drafted in accordance with the decision of the District Court of Appeals in *Healy I.*

Appellees opposed Appellants' Motion For Summary Judgment and filed a Cross-Motion For Summary Judgment on February 23, 1985.

On September 19, 1984, the Wine & Spirits Wholesalers of Connecticut, Inc., filed a motion to intervene in the District Court action, based on the fact that the beer price affir-

mation provisions challenged by the Appellees were substantially similar in language and effect to Connecticut's affirmation provisions pertaining to alcohol and spirits. Said motion to intervene was granted and subsequently on February 13, 1985, Intervenor-Appellants filed a memorandum in support of Appellants' Motion For Summary Judgment.

On September 11, 1987, the District Court granted Appellants' motion for summary judgment and denied Appellees' motion for summary judgment. Appellees filed a notice of appeal on October 13, 1987.

On June 13, 1988, the United States Court of Appeals for the Second Circuit reversed the decision of the District Court. A Notice Of Appeal was filed by Appellants John F. Healy, et al on June 29, 1988 and by Appellants Wine and Spirits Wholesalers of Connecticut, Inc. on July 7, 1988.

SUMMARY OF ARGUMENT

Connecticut enacted its beer affirmation statute pursuant to Section 2 of the Twenty-First Amendment which grants the states clear authority to regulate the times, places and circumstances under which liquor may be sold. In addition to the clear delegation of authority to the states evidenced by the language of the Twenty-First Amendment, both the history and purpose of this constitutional provision provide a compelling indication of legislative intent to confer upon the states the power to regulate trade in liquor. It is also well established that a state retains broad regulatory powers under the Twenty-First Amendment, including those to absolutely prohibit the importation or distribution of liquor within its borders. The Twenty-First Amendment created an exception to the normal operation of the Commerce Clause. Connecticut's beer affirmation provisions were enacted pursuant to an express delegation of power to the states under the Twenty-First Amendment. The Twenty-First Amendment cannot be argued away.

As a legislative enactment, the Connecticut statute is entitled to a presumption of validity. Moreover, courts should exercise an appropriate level of judicial restraint in analyzing the wisdom and utility of a state statute, particularly in light of the Twenty-First Amendment. The Court should not sit as a super legislature to weigh the wisdom of legislation.

The Court should also give appropriate deference to judicial precedent as established in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). The New York statute upheld in *Seagram* was far more restrictive and onerous than the Connecticut statute. In *Seagram*, under circumstances similar to this case, the Court found that the Appellant's claims of economic harm were conjecture and speculative. *Seagram* is stare decisis and for the reasons stated in *Seagram*, the Connecticut statute should be upheld.

Connecticut's beer affirmation statute is constitutionally valid on its face. The amended Connecticut statute only requires that out-of-state shippers post their prices for the following month and that the price at the moment of posting in Connecticut is no higher than the lowest price offered to

wholesalers in any of Connecticut's border states. A price change in any state subsequent to posting in Connecticut is not a violation of Connecticut law.

Under the first prong of the *Pike v. Bruce Church*, 397 U.S. 137 (1970) test, the Connecticut statute passes constitutional scrutiny in that price changes in border states do not constitute a violation of Connecticut law. In contrast to the New York ABC law struck down in *Brown-Forman*, Connecticut's beer affirmation law does not regulate prices in other states. Furthermore, the Connecticut statute does not discriminate in favor of in-state economic interests over out-of-state interests because Connecticut has no in-state brewers. In short, the Connecticut statute does not regulate or discriminate against interstate commerce.

The Connecticut statute is constitutional as applied in that it places only incidental and indirect burdens on interstate commerce. The statute survives challenge under the second prong of the *Pike* test which balances local benefits derived from the statute against the indirect or incidental burdens on interstate commerce. Connecticut maintains legitimate state interests and purposes served by its affirmation statute. Insignificant and indirect extraterritorial effects will not invalidate a statute under the Commerce Clause. *See Healy II*, 669 F.Supp. 543; *Brown-Forman v. Tennessee Alcoholic Beverage Comm'n.*, 860 F.2d 1354 (6th Cir. 1988).

Even if market distortions in buying patterns or pricing exist as a result of the Connecticut statute, Appellees have never demonstrated any quantifiable economic injury despite countless opportunities to do so. The evenhanded operation of the Connecticut affirmation statute and resulting local benefits clearly outweigh any incidental or speculative burdens on interstate commerce.

The amended Connecticut affirmation statute eliminates all but incidental extraterritorial effects. Although the brewers are free to change prices in any other state at any time, the

Second Circuit Court of Appeals found that the Connecticut statute interferes with the brewers' ability to set prices in some of the bordering states due to interaction with regulatory restrictions in those states. Connecticut has done all that it can to eliminate any extraterritorial effects of its affirmation statute by explicitly permitting price changes in other states. This is consistent with the Court's ruling in *CTS Corp. v. Dynamics Corp. of America*, 107 S.Ct. 1637 (1987).

In attributing extraterritorial effects to the Connecticut statute based upon its interaction with other states' liquor regulations, the Second Circuit in effect affixed the operation of other state statutes to the Connecticut statute. Not only does this "through the looking glass" analysis impose impermissible extraterritorial effects of other states' statutes upon Connecticut, but this reasoning also encourages the anomalous, but perhaps unintended, result of legitimizing legislation based upon the principle of "first in time, first in right." Connecticut maintains a plethora of legitimate state interests to regulate the distribution of alcohol within its borders, not the least of which is to insure that its wholesalers, retailers and consumers be treated equitably by receiving prices for alcoholic beverages similar to those received by counterparts in neighboring states.

Connecticut's beer affirmation statute is in harmony with both the Twenty-First Amendment and Commerce Clause. The Twenty-First Amendment has mandated the creation of fifty state liquor markets established along geographical boundaries. Within this framework of fifty "artificial" state markets, the brewers without appropriate state regulation would be in a position to fix prices on a state-by-state basis.

Under the guise of espousing free market competition, the brewers have attempted to turn both the Commerce Clause and Twenty-First Amendment on their head and instead institutionalize state-by-state price discrimination along geographical state borders. In effect, the brewers wish to coronate themselves as self-regulating price dictators in an otherwise heavily regulated liquor industry, effectively sanc-

tioning the subsidization of lower prices in one state "market" by charging higher prices in another state "market".

Connecticut's affirmation statute avoids the institutionalization of this inherently inequitable price discrimination. The brewers have never put forward a tenable explanation of why Connecticut wholesalers, retailers and consumers charged higher prices for liquor than their counterparts in less concentrated markets in neighboring states. Connecticut wholesalers, having traditionally been charged higher prices than their neighboring counterparts, have been clearly victimized by this price discrimination.

Connecticut's affirmation statute eliminates the institutionalization of unjustifiable privilege for wholesalers protected by statewide pricing laws in "privileged" states, which contain certain highly concentrated markets. The laws in those states mandating statewide prices for the distribution of alcoholic beverages arguably have impermissible extraterritorial effects through the institutionalization of artificial price subsidization by consumers in "non-privileged" states. In contrast, as a valid expression of Connecticut's legislative authority under the Twenty-First Amendment, the Connecticut affirmation statute insures evenhanded competition consistent with the spirit of the Commerce Clause. In short, the Connecticut statute is in harmony with the Twenty-First Amendment's Commerce Clause of the U.S. Constitution.

ARGUMENT

I. THE TWENTY-FIRST AMENDMENT TO THE U.S. CONSTITUTION SANCTIONS CONNECTICUT'S LIQUOR CONTROL ACT INCLUDING BEER AFFIRMATION PROVISIONS.

A. History and Purpose of the Twenty-First Amendment.

The second section of the Twenty-First Amendment provides that "the transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." In addition to the clear delegation of authority to the states evidenced by the aforementioned language, both the history and purpose of the Twenty-First Amendment provide a compelling indication of legislative intent to confer upon the states the power to regulate trade in liquor. *324 Liquor Corp., DBA Yorkshire Wine & Spirits v. Duffy, et al.*, 107 S.Ct. 720 (1987), (hereinafter *324 Liquor*).

Prior to the adoption of the Twenty-First Amendment, there was an intricate and lengthy history of state and federal legislation respecting intoxicating liquor and resulting litigation under the commerce clause, *Bacchus Imports, Ltd. et al. v. Dias, Director of Taxation of Hawaii, et. al.*, 467 U.S. 263, 281 (1983); *See also United States v. Hill*, 248 U.S. 420 (1919); *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311 (1917); *In re Rahrer*, 140 U.S. 545 (1981); *Leisy v. Hardin*, 135 U.S. 100 (1890); *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465 (1888); *Walling v. Michigan*, 116 U.S. 446 (1886); *License Cases*, 5 How. 504 (1847), *overruled, Leisy v. Hardin, supra*.

Prior to adoption of the Twenty-First Amendment, the commerce clause had effectively prevented states from unilaterally banning the local sale of intoxicating liquors from out of state. *Leisy v. Hardin*, 135 U.S. 100 (1890). Nonetheless, Congress acting pursuant to its plenary power under the commerce clause, essentially conferred that authority back to the states and the Supreme Court upheld that exercise

of congressional power. *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311 (1917).

The Eighteenth Amendment, ratified in 1919, prohibited the manufacture, sale, and transportation of intoxicating liquors for beverage purposes, and expressly conferred concurrent power to enforce the prohibition on Congress and the several states. Section 1 of the Twenty-First Amendment, ratified in 1933, repealed the Eighteenth Amendment. However, the constitutional authority of the states to regulate commerce in intoxicating liquors did not revert to them until the passage of section 2 of the Twenty-First Amendment. *Bacchus* at 281.

A legislative history of the Twenty-First Amendment suggests that the Senate considered the question of 'states rights' relative thereto in great detail. *324 Liquor Corp.* at ____. Taking notice of the evisceration of a proposed section 3 to the amendment which would have granted the Federal Government concurrent authority over some limited aspects of the commerce of liquor, the Court has noted that those "Senate discussions clearly demonstrate an intent to confer on States complete and exclusive control over the commerce of liquor." *Id.*

The broad grant of express authority to the states in section 2 of the Twenty-First Amendment leaves to the states the power to determine the manner of transportation or importation of liquor into each state, including complete prohibition of alcoholic beverages within a state. The purpose of this constitutional amendment to specifically transfer this authority from the federal government to the states is clear from the Senate's debate concerning same.

As consistently held by this Court, "[the Twenty-First Amendment] bestowed upon the states broad regulatory power over the liquor traffic within their territories." *United States v. Frankfort Distilleries*, 324 U.S. 293, 299 (1945); *Cf. Nippert v. Richmond*, 327 U.S. 416, 425, n. 15 (1946). The

Court further noted in *324 Liquor*, "just two Terms ago we took occasion to reiterate that a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 330 (1964); *See State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *Zifferin, Inc. v. Reeves*, 308 U.S. 132 (1939); *California v. Washington*, 358 U.S. 64 (1958); *Cf. Indianapolis Brewing Co. v. Liquor Comm'n*, 305 U.S. 391 (1939); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939)." 384 U.S., at 41-42.

B. Total Prohibition by State Sanctioned by the Twenty-First Amendment.

Given the unambiguous language of section 2, the Court has ruled that a total prohibition of alcoholic liquors by a state under this constitutional provision would not violate the commerce clause. *Hostetter* at 330. Surely, a state acts within its constitutional authority in promulgating a statute such as Connecticut's affirmation law with clearly a lesser degree of regulation than total prohibition. *Bacchus* at 283.

This Court has further stated that it is well established that a state has broad power under the Twenty-First Amendment "to regulate the times, places and circumstances under which liquor may be sold", *New York State Liquor Authority v. Bilanca*, 452 U.S. 714 (1981); *See also Duran v. Salem, Inc.*, 422 U.S. 911 (1975); *Zifferin, Inc. v. Rives*, 308 U.S. 132 (1939); *California v. LaReau*, 409 U.S. 109 (1972). As noted in the District Court's decision, section 2 of the Twenty-First Amendment "grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *John F. Healy v. The Beer Institute*, 669 F.Supp. -549, (1937) (hereinafter *Healy II*); *See also California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980).

The District Court correctly concluded that because a state may entirely exclude alcoholic beverages from its markets, less restrictive forms of regulations are within a state's

authority, *Id.; see also State Board of Equalization v. Young's Market Company*, 299 U.S. 59, 62-63 (1936), although under traditional commerce clause limitations it could not ban the sale of other products: *See Baldwin v. G.A.F. Seelig, Inc.* (hereinafter "Seelig"), 294 U.S. 511. Likewise, a state would not necessarily be free to impose similar restrictions with respect to milk. *Healy II*, 599; *see also Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976).

C. Exception to Normal Operation of Commerce Clause.

Nevertheless, as the Supreme Court observed in *Craig v. Boren*, 429 U.S. 190 (1976), "this court's decision . . . (has) confirmed that the (Twenty-First Amendment) primarily created an exception to the normal operation of the Commerce Clause," *Id.* at 206.

Since its adoption, the Twenty-First Amendment has remained the governing force in granting states the right to regulate the sale of liquor within their borders. As recently as September, 1984, Judge Friendly of the Second Circuit noted:

> "for some of us who were present at the creation" of the Twenty-First Amendment . . . the Twenty-First Amendment was designed to end the "noble experiment" by which the federal government endeavored to control the drinking habits of all citizens and place control of alcoholic beverages in the states. Fulfillment of the latter purpose required that, in addition to repealing the Eighteenth Amendment, which was accomplished by Section 1, the amendment gives the states full authority to deal with the subject of intoxicating liquor free from limitations imposed by the Commerce Clause, which had hampered such regulation before the Eighteenth Amendment was adopted. This was accomplished by Section 2 of the Twenty-First Amendment which provides: "the transportation or importation in any state, territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby, prohibited."

Jack R. Battipaglia and Bacchus Selections, Inc. v. New York State Liquor Authority, No. 84-7168 (2d Cir. 1984).

D. Analysis of Interaction of Twenty-First Amendment and Commerce Clause Based upon Express Delegation of Power.

The District Court properly concluded that in discussing the Twenty-First Amendment and the commerce clause "each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case." *Healy II* at 550, quoting *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, (hereinafter "Brown-Forman"), 476 U.S. 573, 2084 (1986), quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964); *See Midcal* at 109 (what is required in this area is a pragmatic effort to harmonize state and federal powers).

Applying Justice O'Connor's analysis from the dissent in *324 Liquor Corp.*, the proper inquiry is not whether the State of Connecticut chose wisely in enacting its beer affirmation provisions, nor whether the State's motivation was linked to a "central purpose" of the Twenty-First Amendment. The sole "question is whether the provision in this case is an exercise of a power expressly conferred upon the states by the Constitution," quoting (Stevens, J, dissenting in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 287.)

Appellees maintain that the Twenty-First Amendment does not authorize the states to interfere with commerce in other states. As the District Court correctly found, and as discussed herein, Connecticut's affirmation statute does not in any way interfere with commerce in other states. Appellees' claims to the contrary are spurious. Thus, notwithstanding Appellees' wishes to the contrary, the Twenty-First Amendment has a direct bearing in affirming the constitutionality of Connecticut's beer affirmation statutes. The Twenty-First Amendment cannot be argued away.

II. CONNECTICUT'S AMENDED BEER AFFIRMATION STATUTE WITHSTANDS SCRUTINY UNDER THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION.

A. Presumption of Validity and An Exercise of An Appropriate Level of Judicial Restraint Relative to Connecticut's Beer Affirmation Statute.

In contemplating whether a statute, such as Connecticut's beer affirmation statute, is constitutional, legislation is presumed constitutional unless clearly shown not to be so. *United States Brewers Association v. Healy*, 669 F.Supp. at 548-549.

As the District Court correctly concluded, judges should not, in the exercise of the judicial function, undertake to second guess the political judgment of legislatures. *Healy II* at 548. Thus, the District Court held that judges *must* [emphasis added] refrain from reading their own policy preferences into the Constitution by striking down legislation deemed to be unwise or even foolish. *Id.* This comports with a great volume of cases where the courts have enunciated the fundamental rule that there is a presumption in favor of the constitutionality of a legislative enactment. *Hodel v. Indiana*, 101 S.Ct. 2376 (1980). Moreover, every reasonable presumption must be indulged in favor of the validity of a statute. *Home Tel. & Tel v. Los Angeles*, 211 U.S. 265 (1908). Where a relationship exists between a statute and its articulated objectives or purposes, it is not the function of the judiciary to challenge the wisdom of a state statute. *Norfolk Southern Corp. v. Oberly*, 822 F. 2d 388 (1987). The District Court both recognized the presumed validity of Connecticut's beer affirmation statute and exercised an appropriate level of judicial restraint in upholding same.

Dating back to 1952, the Supreme Court noted "we do not sit as a super legislative to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends

the public welfare." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). Additionally, in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), (hereinafter *Seagram*) the Supreme Court found that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies who are elected to pass laws . . . it is up to the legislature, not the courts to decide on the wisdom and utility of legislation." *Id.* at 47; *Ferguson v. Skrupa*, 372 U.S. 726, 728-730 (1963). This is consistent with the Court's inclination to adhere to principles of judicial restraint.

As the Court noted in *Vance v. Bradley*, 440 U.S. 93, 112 (1979), "when the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . no less than debates over the wisdom of other socioeconomic legislation . . . are not to be carried out in the federal courts." As recently as 1987, the court reaffirmed this position: "the Constitution does not require the states to subscribe to any particular economic theory. We are not inclined to second guess the empirical judgments of lawmakers concerning the utility of legislation'. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 679; *see also, CTS Corp. v. Dynamics Corp. of America*, 107 S.Ct. 1637 (1987).

In short, "[a] law can be both economic folly and constitutional." *CTS Corp.*, 107 S.Ct. at ____. Of at least equal significance, Connecticut's affirmation law comports with the Supreme Court's dispositive ruling on liquor affirmation legislation in *Seagram*.

B. Stare Decisis in Seagram Substantiates The Constitutionality and Validity of The Connecticut Affirmation Statute.

In *Seagram*, the Supreme Court upheld the constitutionality of a New York posting and affirmation statute far more restrictive than the statute at issue. The New York statute in that case required that the monthly price schedules for sales to wholesalers and retailers, as filed with the New York State

Liquor Authority, be accompanied by an affirmation that "the bottle and case price of liquor . . . is no higher than the lowest price" at which sales were made anywhere in the United States during the preceding month. *Seagram* at 39-40.

In upholding the constitutionality of the New York law, the Court noted that the case concerned liquor "destined for use, distribution, or consumption in the state of New York." *Id.* at 42. The Court held that "the Twenty-First Amendment demands wide *latitude* [emphasis added] for regulation by the state." *Id.*

The Court reasoned that New York could "constitutionally insist" that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country. *Id.* at 43. Holding for the state, the Court added that the Appellant's argument that the statutes would have a discriminatory effect on their businesses outside the state were largely "conjecture" and that "the mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not with the domain which the Constitution forbids." *Id.* at 43. As in *Seagram*, Appellants in this appeal assert alleged economic injury that calls for conjecture and speculation.

In *Seagram*, this Court declined to strike down a New York statute because, among other reasons, the Appellants in *Seagram* had failed to demonstrate quantified economic harm. The Appellees in this appeal appear before this Court, more than twenty years later, making the same claims of theoretical and speculative economic injury. As in *Seagram*, Appellees ask this Court to strike down an affirmation statute based on "conjecture." For the reasons stated in *Seagram* alone, Appellees' challenges, based on speculative economic harm, should be dismissed.

Seagram has never been overruled and is both stare decisis and the dispositive statement on state liquor affirmation provisions. If it has been somewhat modified by the Supreme

Court in *Brown-Forman*, said modifications have no effect on the constitutionality of the Connecticut affirmation statute under the strict limitations set forth therein.

C. Connecticut's Beer Affirmation Statute Is Constitutionally Valid on Its Face.

In *Brown-Forman Distillers v. N.Y. State Liquor Authority*, 476 U.S. 573, (1976), Justice Marshall suggested that the Court "has adopted what amounts to a two-tiered approach to analyzing state economic legislation under the Commerce Clause" 106 S.Ct. at 2084. Under the two-tier criteria established under *Pike v. Bruce Church, Inc.*, (hereinafter "*Pike*"), 397 U.S. 137, 142 (1970), the 'per se' invalid prong of the test examines whether a state statute directly regulates or discriminates against interstate commerce or in effect favors in-state economic interests over out-of-state economic interests. A statute that directly regulates or discriminates against interstate commerce would be struck down "per se" without further inquiry. *Id.*

The District Court applied the "per se" standard enunciated in *Brown-Forman* to Connecticut's affirmation statute and correctly found that the statute did not directly regulate or discriminate against interstate commerce. *Healy II*, at 553. Under the current Connecticut law, shippers must post their price schedule, hold it for the next full month, and affirm that the price, *at the time of posting* [emphasis added], is no higher than the lowest price offered to wholesalers in other states bordering Connecticut. Conn. Gen. Stat. Section 30-63b(b). Since posting occurs at a precise moment in time, it is clear that the Connecticut law is not keyed to any prospective or retroactive time span and thus does not in any way inhibit price changes by an out-of-state shipper at any time. Moreover, Conn. Gen. Stat. Section 36-63b(e) specifically provides:

> This section (affirmation) shall not prohibit a manufacturer or out-of-state shipper permittee or the

authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any such time during the calendar month covered by such posting.

Clearly a price change by a shipper in another state is not a violation of Connecticut law. The Connecticut statute does not prohibit price changes in other states, nor purport to influence or regulate prices in other states. In fact, the Connecticut statute expressly invites out-of-state shippers to change prices in other states at any time. *See* Conn. Gen. Stat. Section 30-63b(e). This eliminates the Appellees' argument that Connecticut law facially manifests an impermissible extraterritorial effect as further discussed infra. Indeed, at one time, Appellees in the pending case withdrew their argument on this point. *Healy II at* ____.

Moreover, there is no possibility that Connecticut's affirmation law regulates prices in other states. This is in contrast to the Court's finding that the New York ABC law, struck down in *Brown-Forman*, had an overall effect to directly regulate prices in other states.

For instance, if the lowest price for a case of X brand beer in New York, Rhode Island, and Massachusetts is $10.00 at 10:00 a.m. on January 6 (time of posting in Connecticut; *See 7 Reg. Conn. Agencies, Liq. Cont.* Sec. 30-6-B4a), then the price for that same item in Connecticut must be affirmed at $10.00 or less for sale in Connecticut under Connecticut law. If at any time subsequent to that posting, the price of a case of X brand beer is changed to $9.00 in one of the border states, Connecticut law is not violated, nor does it prevent such a price change in another state.

Appellees maintain that Connecticut law prevents brewers from changing their prices in Massachusetts, New York and Rhode Island. It is not Connecticut law that prevents a price

change, although there may be restrictive laws or regulations within those other states which prevent such changes.

The District Court correctly concluded that "under *Seagram*, Connecticut's affirmation statute is facially valid" because, unlike the version in *Healy I* and *Brown-Forman*, it leaves brewers free to raise or lower prices in the border states before and after posting in Connecticut and does not, therefore, regulate interstate commerce. *Healy II*, 669 F.Supp. at 553.

Connecticut's beer affirmation law also does not discriminate by favoring in-state economic interests over out-of-state interests. Connecticut's Posting and Affirmation statutes are designed in such a way that the wholesaler, retailer and consumer pay prices that are fair and competitive with their counterparts in border states. Furthermore, Connecticut's law does not protect in-state industry at the expense of out-of-state industry, because Connecticut has no in-state brewers. Cf. *Seelig*.

The Sixth Circuit has recently upheld the constitutionality of a liquor affirmation statute on its face and as applied, similar to the Connecticut statute. In *Brown-Forman Corporation v. Tennessee Alcoholic Beverage Commission*, Nos. 87-5870/87-5913, slip op (6th Cir. Nov. 4, 1988), the Court upheld the constitutionality of Tennessee's liquor affirmation law – a law similar to Connecticut's affirmation law which is at issue in this appeal.

The Tennessee law was challenged on the grounds that the practical effect of the law was to control liquor prices in other states. The Tennessee law, like Connecticut's, is a liquor affirmation statute which requires that a manufacturer of alcoholic beverages may not charge or quote a price that is higher than any wholesale price currently charged by the manufacturer in any other state. The Tennessee statute is arguably more onerous than the Connecticut law in that the Tennessee law references prices nationwide, while the Connecticut statute only references Connecticut's border states. The Sixth

Circuit Court of Appeals found that Tennessee's affirmation law did not make price changes in other states illegal nor purport to regulate prices in other states. The Sixth Circuit consequently found that the Tennessee statute is constitutional. The Sixth Circuit reasoned that although the Tennessee statute may arguably discourage out-of-state price reductions in that such price changes must be replicated in Tennessee, the statute is constitutional because it does not prohibit price changes in other states. *Brown-Forman v. Tennessee*, at . Thus the Court found that while the statute may have an indirect effect on manufacturers' profits in the interstate market, the statute does not prompt price changes in any other state and consequently does not directly regulate interstate commerce. *Brown-Forman v. Tennessee*, at . Similarly, Connecticut's affirmation law should be upheld in that the statute does not make price changes in other states illegal nor purport to regulate prices in other states. Conn. Gen. Stat. Section 30-63b(3).

The Sixth Circuit also found that any effect on interstate commerce resulting from an affirmation statute that purports to prohibit discriminatory prices is certainly less onerous than an absolute prohibition on the sale of liquor as sanctioned by the Twenty-First Amendment. *Brown-Forman v. Tennessee* at . Further, the court found that such interstate effects do not necessarily invalidate a statute, especially when the products come within the purview of the Twenty-First Amendment. *Id.* at , citing *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978).

Similar to the statute upheld by the Sixth Circuit, the Connecticut statute does not prohibit price changes in neighboring states. The Sixth Circuit therefore correctly concluded, as the Second Circuit should have concluded, that while such an affirmation statute may incidentally and indirectly affect the interstate liquor market, such statutes do not constitute "regulation" of liquor prices in other states.

Connecticut's legislation treats all brewers equally, so that no particular brewer, and no one particular state, is dispropor-

tionately affected by these statutes. Connecticut simply places upon all brewers desiring to sell their products in Connecticut a uniform element of market price competition, without regulating interstate prices. The state's beer affirmation statute is therefore facially valid.

D. Connecticut's Beer Affirmation Statute Is Constitutional as Applied in That it Places Only Incidental and Indirect Burdens on Interstate Commerce.

The District Court also correctly found that, in addition to being facially valid, Connecticut's beer affirmation statute passed muster under the second prong of the *Pike* two-tier standard which balances the local benefits of a statute against any indirect burdens on interstate commerce. Simply stated, "the critical consideration – under either test, is the overall effect of the statute on both local and interstate activity". *Brown-Forman*, 106 S.Ct. at 2084.

The District Court correctly discounted the Appellees' assertions that some business of Connecticut residents previously going to border state retailers would shift to Connecticut retailers and found that "some artificially" high prices (in the border states) and/or "artificially" low prices that result in Connecticut from beer price affirmation would not render the statute unconstitutional. In fact, quite to the contrary, the District Court noted that the Supreme Court has held that a state may "constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country." *Seagram*, 384 U.S. at 43; *Healy II*, 669 F.Supp. at 553.

A "non-discriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from predominantly out-of-state industry to a predominantly in-state industry," *Healy II*. 669 F.Supp. at 553, quoting *Minnesota v. Cloverleaf Creamer Company*, 449 U.S. 456 (1981). In effect, the District Court found that the

disincentive to Connecticut consumers to buy outside the state (never quantified by the Appellees nor shown to be of more than minor economic significance) and the necessity that brewers set their prices in the border states knowing that they are simultaneously setting their prices in Connecticut, are not excessive burdens or intrusions on commerce, *Healy II*, 669 F.Supp. at 553. In effect, the District Court found that there was an insignificant and indirect extraterritorial effect on interstate commerce.

Furthermore, the District Court held that "because Connecticut's statute operates even-handedly and serves a legitimate purpose in reducing discrimination in pricing to wholesalers in Connecticut as opposed to out-of-state wholesalers, such incidental and indirect burdens on interstate commerce do not outweigh the resulting local benefits." *Id.* The Connecticut statute thereby withstands constitutional scrutiny under the second tier balancing test of the *Pike* analysis.

The District Court's opinion relative to the second tier of the *Pike* test is supported by the Sixth Circuit's decision in *Brown-Forman v. Tennessee*. In applying the *Pike* balancing test to the Tennessee Liquor Affirmation Statute, the Sixth Circuit appropriately found that while the Tennessee statute may require a manufacturer to raise prices in other states in order to effectively raise prices in Tennessee, "it is by no means clear . . . that [Tenn. Code Ann. Section 57-3-202(e)] must inevitably produce higher prices in other States . . . rather than the lower prices sought for Tennessee." *Brown-Forman v. Tennessee* at p. , paraphrasing *Joseph E. Seagrams & Sons, Inc. v. Hostetter*, 384 U.S. 35, 43 (1966). The Sixth Circuit, in balancing Tennessee's legitimate state interest against theoretical and unquantified effects on the interstate liquor market, found that Appellants had never produced evidence of the alleged market distortions or effects on prices in other states. Similarly, the Appellees-Brewers in this appeal have never produced a scintilla of evidence supporting their claims of market distortions or disadvantages suffered by out-of-state

consumers as a result of the Connecticut affirmation statute. Despite countless opportunities in the course of the myriad of litigation on liquor affirmation statutes, the brewers and out-of-state shippers have never quantified or demonstrated any quantifiable economic harm from liquor affirmation.

In short, the Connecticut statute is constitutional under the *Pike* balancing test. Connecticut's numerous state interests discussed supra, clearly outweight the incidental and indirect burdens on interstate commerce and speculative and theoretical alleged economic harm.

E. The Amended Connecticut Affirmation Statute Eliminates Extraterritorial Effects.

The District Court was correct in concluding that the Connecticut statute does not directly regulate or discriminate against interstate commerce. *Healy II*, 669 F.Supp. at 533. Since posting in Connecticut occurs at a moment in time, it is clear that the Connecticut law is not keyed to any prospective or retroactive time span and thus does not in any way influence or inhibit price changes by out-of-state shippers at any time.

Notwithstanding these distinctions, the Appellees argued, and the Second Circuit Court of Appeals ruled, that an impermissible extraterritorial effect remains apparent on its face because brewers are in fact not free to change prices in other states due to regulatory restrictions in those other states. Citing the monthly price hold laws in Massachusetts, 138 M.G.L.A. Sec. 25B(d), and the 180 day hold on price reductions mandated by New York law, N.Y. Alco Bev. Cont. Law Sec. 55(2) (McKinney 1987), the court found that brewers must still look ahead to consider the impact of their pricing decisions in Connecticut when making pricing decisions in Massachusetts and New York. *Healy II*, F.2d ____ App.

It is well settled that the practical effect is a critical element in determining whether an affirmation statute is 'per

se' invalid under the Commerce Clause. In applying the *Pike per se* analysis to an affirmation statute, courts have considered whether the statute escapes the state borders to control liquor prices in other states. *Brown-Forman*, 476 U.S. at 583 citing *Southern Pacific Co. v. Arizona*, 335 U.S. 761, 775 (1945). However, in this case, Connecticut has done all that it can to remove the extraterritorial effect of its legislation. The Connecticut affirmation provisions do not bar, deter, or delay price decisions in other states. They specifically leave brewers free to select their own price levels in other states. The fact that there are regulatory restrictions on price changes in other states is a matter beyond Connecticut's control.

Connecticut eliminated extraterritorial effects of the affirmation statute by enacting the amended affirmation provisions which invite the brewers to change prices in other states at any time. Unlike the New York law in *Brown-Forman*, it is not a violation of the Connecticut statute to change prices in any other state at any time. Nor does Connecticut attempt to influence prices or pricing decisions in other states. Connecticut merely guarantees its residents the lowest price among the border states at an exact moment in time. Any extraterritorial effect is thereby eliminated. Apparently in deference to this logic, Appellees-Brewers at one point withdrew argument on this point. *Healy II*, ____ F.2d ____. App.

This position is consistent with a recent Supreme Court decision concerning an Indiana tender offer statute. In *CTS Corporation v. Dynamics Corp. of America*, 107 S.Ct. 1637 (1987), (hereinafter "CTS"), the Court held that as long as the state only regulated Indiana corporations, the Commerce Clause was not violated. 107 S.Ct. at 1649. The Court went on to discuss the Court of Appeals' analysis relating to balancing the state and federal interests. Rather than engage in a true balancing analysis, the Supreme Court simply suggested that the substantial and legitimate state interest in regulating corporate governance was permissible and emphasized that courts should exercise judicial restraint in evaluating the wisdom of state laws that may have some impact on interstate commerce.

> The Constitution does not require the states to subscribe to any particular economic theory. We are not inclined to second-guess the empirical judgments of lawmakers concerning the utility of legislation. 107 S.Ct. at 1651.

The *CTS* opinion bears significantly on this case for two reasons. First, it indicates that the Court has employed a more limited method for evaluating Commerce Clause challenges. By focusing on protectionism, the Court has eliminated *ad hoc* balancing analyses that must inevitably weigh the incidental burdens of state legislation on interstate commerce.

Second, given the focus in *CTS* on protectionism, and away from the extraterritorial effects that frequently accompany state legislation, the opinion suggests that courts should defer more frequently to a state's legitimate and constitutional exercise of power. To the extent that state discriminatory intent is proscribed by the commerce clause, federal courts consequently should not engage in evaluating the wisdom of state policies simply because they have some incidental interstate impact.

F. Connecticut Maintains a Plethora of Legitimate State Interests to Regulate the Distribution of Alcohol within its Borders.

Despite voluminous litigation involving Connecticut's Liquor Control Act, Appellees have never provided reasoning as to why prices should be substantially lower in three border states than in Connecticut, or conversely, why they should be much higher in Connecticut than in the border states. Connecticut maintains a plethora of legitimate state interests to regulate importation, distribution and sale of alcoholic liquor within its boundaries, not the least of which is insuring that Connecticut wholesalers and retailers be treated equally by receiving the same prices as their neighbors across state lines. Because the Connecticut law allows brewers to

reflect additional shipping and tax costs in determining the affirmed price, there is no valid reason why brewers should charge more in Connecticut than in its three border states.

Connecticut does not seek to dictate the prices at which the brewers offer their products. Connecticut is simply insisting that its wholesalers be placed on an equal footing with wholesalers in the border states, and that they not be singled out to subsidize lower prices charged by brewers in these border states. This is similar to the mandate which seventeen "control" states with state-run liquor retail operations have given to national liquor distillers and importers. *See Seagram, supra.*

The Twenty-First Amendment does not grant additional legislative authority to a state simply because it declares itself to be a market participant, as the several so called "control" states. Conversely, a state and its consumers should not be penalized for its failure to do so.

It is fundamental economics that if brewers charge artificially low prices in certain arbitrarily privileged states, they will charge comparably higher prices in other states in order to achieve targeted profit margins. Acknowledging this inevitable market price discrimination, Connecticut has sought only to insure that its consumers will not be subsidizing the lower prices being charged to consumers in bordering states.

Additionally, there is no constitutional right to engage in the sale of alcoholic liquors, and alcoholic liquors are clearly distinguishable from other consumer products, such as milk. See discussion of Twenty-First Amendment, *supra.*

Furthermore, markets and distribution channels involving alcoholic liquors are heavily regulated and to a great extent protected through this state-by-state licensing system. Unlike other industries, an upstart brewer/importer could not simply begin operation by manufacturing and distributing its products in the United States without first applying to and

being approved by appropriate state and federal regulatory authorities. Thus, there are market entry barriers resulting from the licensing system which serve to artificially protect industry-wide giants, such as many of the appellees in this action, from competition.

Connecticut has a legitimate state interest in maximizing sales within its own borders in order to increase its tax revenue. Increasing state revenue is particularly important in Connecticut, where there is no state income tax, and the state must rely on a sales tax, and on such taxes as those imposed on alcohol, to fund the state budget. Furthermore, highway safety must be considered a unique factor with regards to traveling across state lines to purchase intoxicating alcohol. The state has a legitimate interest in trying to curtail buying patterns that could lead to increased danger on the highways.

There are some state activities which have been held invalid under the Commerce Clause. For example, in *Philadelphia v. New Jersey*, 437 U.S. 617 (1977), the State of New Jersey attempted to prevent out-of-state shippers from depositing their garbage in New Jersey landfills, while granting the New Jersey sources of garbage preferential treatment in being admitted to their landfill sites. In order to adjudge a state law infirm under the commerce clause, the Court stated that "what is crucial is the attempt by one state to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Id* at 628.

Connecticut's affirmation law does not isolate Connecticut from its border states, but rather insures that the state is treated in harmony with neighboring states. Rather, Connecticut's affirmation statute insures that Connecticut is not "isolated" or targeted to pay higher prices to subsidize prices charged in the border states. In a similar vein, the Connecticut legislature solely seeks to have its wholesalers, retailers and consumers treated in parity with their counterparts in its neighboring states.

In short, the Commerce Clause does not prohibit a state from enacting reasonable legislation to protect the economic interests of its citizens, even if such legislation incidentally affects interstate commerce:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Id.* at 624, citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

III. CONNECTICUT'S BEER AFFIRMATION STATUTE IS IN HARMONY WITH BOTH THE TWENTY-FIRST AMENDMENT AND THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION.

A. The Markets within the National Liquor Distribution System.

The Twenty-First Amendment has mandated the creation of fifty state markets which have been established along geographic boundaries. As the District Court noted, "market areas do not always coincide with state borders." *Healy II*, 669 F. Supp. at 546.

For example, when brewers and importers establish prices in New York state, under the existing liquor distribution system, wholesalers throughout the entire state benefit from New York City's market concentration. A Connecticut wholesaler in Bridgeport, Connecticut, approximately 50 miles from New York City and arguably serving the same market as New York

City, under the scheme advocated by Appellees would not have the benefit of the indigenous competitive forces at work within this market. Ironically, a Connecticut wholesaler may be arbitrarily placed at a competitive disadvantage with respect to a counterpart in Westchester, New York. Higher prices charged to a Bridgeport wholesaler would in effect subsidize lower prices charged to a wholesaler far removed geographically from this market, for example in Lake George, New York. A wholesaler in Lake George, New York, which by market standards would not maintain any legitimate "competitive advantage," over a wholesaler in Bridgeport, Connecticut consequently benefits by New York state law which ties New York City prices to Lake George prices.

In short, the existing national liquor distribution system as regulated on a state-by-state basis is not a free market and does not afford unregulated price competition.

B. Avoidance of Institutionalization of Price Discrimination through Misapplication of The Twenty-First Amendment.

As proposed by Appellees, the institutionalization of arbitrary price discrimination along state borders would turn federalism on its head by using "federal" commerce clause principles to institutionalize state-by-state price discrimination. This perverse manipulation of the national liquor distribution system would in effect ordain each brewer or importer as an independent sovereign relative to a captive market involving the establishment of pricing policies in each state. Given that some states are themselves market participants with significant purchasing power, pricing decisions relative to non-control states would inevitably be distorted.

If the pricing system proposed by Appellees were adopted, it might have ironic consequences for the Appellees, for it is entirely conceivable that each of the fifty states would evolve into a control state in order to establish equitable pricing poli-

cies for its consumers. At the very least, the inequities of the proposed system are readily evident through application in a state such as New York, as opposed to its neighbor, Connecticut.

Short of restructuring the entire national liquor distribution system through repeal of the Twenty-First Amendment, Appellees are attempting to permanently affix arbitrary (or as the District Court noted, "artificial") market boundaries along state borders. As discussed, liquor markets within states become protected markets by virtue of the operation of state regulatory mechanisms enacted under the Twenty-First Amendment. Appellees are seemingly attempting to institutionalize interstate "competition" based upon intrastate uniform price-fixing. This would be inappropriate on its face under the commerce clause were state boundaries to actually constitute markets. It is preposterous given the reality of radically different market concentrations within each state.

For example, the same price for beer is charged to wholesalers in Lake George and New York City, despite a substantially different market concentration in New York City. The Lake George market, and other markets in the state of New York, are therefore protected by the single price posting mechanism established by the State of New York. The price posted in New York State consequently has no relation to what a competitive market would dictate were the distribution of alcoholic liquors treated similarly to distribution of other products such as milk. Thus wrapped within the veil of sanctimonious commerce clause arguments, Appellees attempt to institutionalized arbitrary price discrimination along state geographic borders. The Connecticut affirmation statute exposes and ultimately eliminates the price discrimination advocated by Appellees by ensuring fair and evenhanded pricing to Connecticut's wholesalers. Connecticut's affirmation laws thereby enhance both the spirit and intent of the Commerce Clause.

C. The Connecticut Affirmation Statute Is in Harmony with Both The Twenty-First Amendment and Commerce Clause.

Exercising its authority under section 2 of the Twenty-First Amendment, Connecticut has attempted to inject competition and market pricing into the regional market by guaranteeing evenhanded treatment to its wholesalers. While the Twenty-First Amendment eliminates free market pricing between states, Connecticut's statute establishes equal footing between wholesalers in Connecticut and wholesalers in its border states, thereby eliminating artificially high prices charged to Connecticut wholesalers.

The Connecticut affirmation statutes effectively operate to enhance the Connecticut wholesaler's ability to compete by requiring a level economic playing field. Given a consumer's ability to purchase alcoholic liquor at retail outlets wherever he or she wishes, a Connecticut wholesaler that is arbitrarily charged higher prices than his counterparts in neighboring states, regardless of inclusion in certain metropolitan markets, would face inherent institutional price discrimination.

Because there is no effective way to compete with institutionalized discounts to wholesalers in border states, Connecticut wholesalers would simply have to accept the brewers or importers fiats of appropriate prices for its "Connecticut" market and thereby inevitably suffer arbitrarily higher prices than wholesalers in, for example, the New York "market", putting Connecticut wholesalers *a priori* at a disadvantage without any opportunity to compete. The pricing schemes advocated by the brewers and importers would ultimately institutionalize permanent economic injustice by mandating arbitrary price discrimination.

In effect, Appellees are advocating the institutionalization of pricing mechanism which smack of the failed economics of centralized economic planning. Given targeted profit mar-

gins, and institutionalized state markets with no effective competition possible between states, certain states and its consumers would be relegated to a permanent status of price discrimination relative to alcoholic beverages. Such a result was certainly not contemplated by those who passed the Twenty-First Amendment. Additionally, a chorus of litigation would inevitably follow. For each state's liquor provisions would be exposed to attack under the commerce clause through alleged institutionalization of statewide pricing mechanisms resulting in impermissible extraterritorial effects in other states, such as Connecticut. A whole new chapter of constitutional challenges would inevitably be opened were Appellees upheld.

If the Appellees in this case wish to restructure the national liquor distribution system through repeal of the Twenty-First Amendment, they certainly possess the economic resources to mount such a challenge through the legislative process. That would be more appropriate than continuous recourse to the judiciary. In any event, it seems that their efforts in this matter are misapplied against a Connecticut beer affirmation statute which seeks to promote both Twenty-First Amendment and Commerce Clause principles by allowing the state to regulate the importation and distribution of alcoholic beverages within its borders while at the same time enhancing fair competition and prohibiting the institutionalization of arbitrary price discrimination.

CONCLUSION

The Twenty-First Amendment sanctions Connecticut's Liquor Control Act including its affirmation provisions.

Connecticut's amended beer price affirmation provisions are constitutional under the commerce clause. This court should exercise an appropriate level of judicial restraint in upholding the Connecticut Statute. Moreover, *Seagram* is stare decisis in upholding the validity of the Connecticut statute. Connecticut's statute is facially valid uner the *Pike* "per se" standard and withstands constitutional scrutiny under the *Pike* balancing test. The amended Connecticut statute eliminates extraterritorial effects. Balancing the plethora of legitimate state interests served by the Connecticut statute against the indirect and incidental burdens on interstate commerce, the Connecticut statute clearly withstands constitutional scrutiny under the commerce clause.

The Connecticut statute is in harmony with both the commerce clause and the Twenty-First Amendment. The Connecticut statute avoids the institutionalization of an artificial and discriminatory pricing system as advocated by the Appellees and instead legislates evenhanded competition.

For all the foregoing reasons, we respectfully request that the Court enters an order summarily reversing the decision of the United States Court of Appeals for the Second Circuit and affirming the judgment of the United States District Court for the District of Connecticut. In the alternative, if appropriate, we urge the Court to reverse the decision of the U.S. Court of Appeals for the Second Circuit and remand this case to the lower court on the sole issue of the constitutionality of the Connecticut statute as applied.

Respectfully submitted,

Wine and Spirits Wholesalers of Connecticut, Inc.

WILLIAM A. WECHSLER
BAILEY AND WECHSLER
Counsel of Record
(A Member of the Bar of
the U.S. Supreme Court)

ALFRED F. WECHSLER
GREGORY J. SOUTHWORTH
BAILEY AND WECHSLER

66 Forest Street
Hartford, CT 06105
Telephone: (203) 525-9191

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Nos. 88-449, 88-513

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

JOHN F. HEALY, et al.,
Appellants,
v.
THE BEER INSTITUTE, et al.,
Appellees.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.,
Appellants,
v.
THE BEER INSTITUTE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLANTS WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.

WILLIAM A. WECHSLER
BAILEY AND WECHSLER
Counsel of Record
(A Member of the Bar of the U.S. Supreme Court)
ALFRED F. WECHSLER
GREGORY J. SOUTHWORTH
BAILEY AND WECHSLER
Counsel of Record
66 Forest Street
Hartford, CT 06105
TELEPHONE: (203) 525-9191

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QUESTIONS PRESENTED

1. Does the Twenty-First Amendment to the U.S. Constitution sanction the State of Connecticut's Liquor Control Act including its amended beer affirmation provisions?

2. Are Connecticut's amended beer affirmation provisions constitutional, on their face and as applied, under the Commerce Clause of the U.S. Constitution?

3. Does the Connecticut beer affirmation statute prevent arbitrary price discrimination by legislating equitable pricing policies within the State of Connecticut in harmony with both the Twenty-First Amendment and Commerce Clause of the U.S. Constitution?

PARTIES

The parties in this action are as follows:

Appellants

JOHN F. HEALY and DAVID L. SNYDER, as Commissioners of the Department of Liquor Control; and CHARLES KASMER, as Secretary of the Department of Liquor Control.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC., as an association, and on behalf of its following members selling alcoholic liquor in the State of Connecticut:

JOHNNY BARTON, INC.; THE BRESCOME DISTRIBUTORS CORPORATION; CONNECTICUT DISTRIBUTORS, INC.; EDER BROS., INC.; GALLO WINE MERCHANTS INC.; ALLAN S. GOODMAN, INC.; and HARTLEY & PARKER LIMITED, INC.

Appellees

THE BEER INSTITUTE (formerly named UNITED STATES BREWERS ASSOCIATION, INC.) as an association, and on behalf of its following members selling beer in the States of Massachusetts, New York and Rhode Island:

Anheuser-Busch Inc., Miller Brewing Company, Latrobe Brewing Company, Pabst Brewing Company, The Stroh Brewery Company.

ANHEUSER-BUSCH, INC.; G. HEILEMAN BREWING COMPANY; THE GENESEE BREWING COMPANY, INC.; MILLER BREWING COMPANY; ALL BRAND IMPORTERS, INC.; DRIBECK IMPORTERS, INC.; GUINESS-HARP CORP.; LABATT IMPORTERS, INC.; MARTLETT IMPORTING COMPANY, INC.; MONTEREY BAY COMPANY, INC.; and VAN MUNCHING COMPANY, INC.

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Appellees.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.,
Appellants,
v.
THE BEER INSTITUTE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported as *Beer Institute v. Healy*, 849 F.2d 753 (2nd Cir. 1988) and a copy of the slip opinion appears in the Joint Appendix ("J.A.") at p. 189A. The earlier opinion of the United States District Court for the District of Connecticut is reported as *U.S. Brewers Ass'n v. Healy*, 669 F. Supp. 543 (D. Conn. 1987) and a copy of the slip opinion appears in J.A. at p. 165A.

JURISDICTION

This case is an appeal from a judgment of the United States Court of Appeals for the Second Circuit entered on June 13, 1988, which reversed the Ruling and Final Judgment of the United States District Court for the District of Connecticut dated September 15, 1987. The District Court had granted, pursuant to Fed.R.Civ. 56, Appellants' Motion for Summary Judgment, and had denied Appellees' Cross-Motion for Summary Judgment, by holding that the Connecticut beer price affirmation provisions contained within the Connecticut Liquor Control Act, Conn. Gen. Stat. Sections 30-63a(b), 30-63b(b) and 30-63c(b), do not violate the Commerce Clause of the United States Constitution, U.S. Const. Art. I, Section 8, cl 3.

On Appeal, the United States Court of Appeals for the Second Circuit reversed and remanded the matter on June 13, 1988, finding that the Connecticut beer price affirmation statute, on its face, violated the Commerce Clause of the United States Constitution. A Notice of Appeal was filed by Appellants Wine and Spirits Wholesalers of Connecticut, Inc. in the U.S. Court of Appeals in New York, New York, on July 7, 1988. A copy of this Notice is attached hereto in J.A. at p. 210A. Appellants docketed this appeal by filing their Jurisdictional Statement pursuant to Supreme Court Rule 12.3 on September 12, 1988. The Court noted probable jurisdiction in this case on November 14, 1988. J.A. at p. 212A.

The jurisdiction of the Supreme Court to hear this case on direct appeal rests upon 28 U.S.C. Sec. 1254 (2), providing for direct appeal to the Supreme Court from a decision of a Court of Appeals invalidating a State statute as repugnant to the U.S. Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .

U.S. Const., Art. I, Sec. 8, cl. 3

THE TWENTY-FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION:

The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const., Amend. XXI, Sec. 2

THE BEER PRICE AFFIRMATION PROVISIONS OF THE CONNECTICUT LIQUOR CONTROL ACT:

No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer as defined in section 30-1, at a bottle, can or case price, or price per keg, barrel or fractional unit thereof, higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

Conn. Gen. Stat. Sec. 30-63a(b)[1]

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[1]Conn. Gen. Stat. Section 30-63a(b) was ruled to be repealed by implication in a Declaratory Ruling by the Connecticut Department of Liquor Control. See Healy II, 849 F.2d 753 at 756, See J.A. at p. 29A.

At the time of posting of the bottle, can, keg or barrel and case price required by section 30-63, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the Department of Liquor Control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that, at the time of posting, the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees is no higher than the lowest price at which each such item of beer is sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

Conn. Gen. Stat. Section 30-63b(b)

In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered at the time of posting by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any such wholesaler; provided that differentials in price which make only due allowance for differences in state taxes and fees and for the actual cost of delivery are permissible. As used in this section, the term "actual cost of delivery" shall mean those expenses incurred by such manufacturer or out-of-state shipper in delivering the item of beer to the wholesaler from the point of origin to the point of destination, the term "point of origin" shall mean the location which has been established through course of dealing as the geographic location from which the wholesaler has been charged by the manufacturer or out-of-state shipper for costs of transportation, notwithstanding the fact that the item of beer may have been manufactured or bottled at, or shipped from, a different geographic location, the term "point of destination" shall mean the location which has been established through course of dealing as the geographic location at which the

wholesaler takes delivery of the item of beer, the term "state taxes and fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon a gallon or liter of such alcohol and spirits of each barrel, or fractional unit thereof, of beer and the term "gallon" shall mean one hundred twenty-eight fluid ounces and term "liter" shall mean one thousand milliliters and the term "barrel" means not less than twenty-eight nor more than thirty-one gallons. A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes and packages, approved by the Department of Liquor Control, of his brand which he offers to any wholesaler in any state bordering this state.

Conn. Gen. Stat. Section 30-63c(b)

THE PRICING PROVISIONS ALLOWING OUT-OF-STATE CHANGES:

This section shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any time during the calendar month covered by such posting.

Conn. Gen. Stat. Section 30-63b(e)

THE POSTING PROVISIONS OF THE CONNECTICUT LIQUOR CONTROL ACT:

Each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department, on a monthly basis, the bottle, can and case price, and for beer, the price per keg or barrel or fractional unit thereof, of any brand of goods offered for sale in Connecticut, which price when so posted

shall be the controlling price for such manufacturer, wholesaler or out-of-state permittee for the month following such posting. Notice of all manufacturer, wholesaler and out-of-state shipper permittee prices shall be given to permittee purchasers by direct mail or advertising in a trade publication having circulation among the retail permittees except a wholesaler permittee may give such notice by hand delivery.

Conn. Gen. Stat. Section 30-63(c)

STATEMENT OF CASE

This case involves Appellees' challenge of the constitutionality of certain price affirmation provisions of the State of Connecticut's Liquor Control Act. Appellees are collectively both a trade association now known as the Beer Institute (an industry-wide association of thirty-nine domestic brewers and twenty-three importers of beer, formerly the United States Brewers Association, Inc.), and individual brewers and importers, some of whom are licensed as out-of-state shippers to sell beer to wholesalers in the State of Connecticut. Appellants are Commissioners and the Secretary of the Connecticut Department of Liquor Control and the Wine & Spirits Wholesalers of Connecticut, Inc., an association of seven companies that are licensed to sell alcoholic liquor on a wholesale basis in the State of Connecticut.

The beer price affirmation provisions of the State of Connecticut Liquor Control Act, Conn. Gen. Stat. Sections 30-63a(b), 30-63b(b), and 30-63c(b,) were first enacted by the Connecticut General Assembly in 1981 in Public Act 81-294. In 1984, the Connecticut General Assembly amended the State's beer price affirmation provisions in Public Acts 84-332 and 84-432. The declared purpose and ultimate result of Public Act 84-332 was to conform Connecticut's beer price affirmation provisions to the U.S. Supreme Court standard as enunciated in *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 284 U.S. 35 (1966) (hereinafter "*Seagram*"), and as modified by the U.S. Court of Appeals Second Circuit's decision in *U.S. Brewers Association v. Healy,* 692 F.2d 275 (2nd Cir. 1982), *affirmed per curiam* 464 U.S. 909, (1983) (hereinafter "*Healy I*").

Rather than requiring out-of-state brewers and importers to certify that their prices "will be" no lower in any of the border states during the month following the posting of prices in Connecticut, the new statute simply requires that at the time of posting the "prices charged to Connecticut wholesalers are *no higher than the lowest price then being charged in any border state.*" [emphasis added] *U.S. Brewers Ass'n v. Healy,*

669 F. Supp. 543, 547 (D. Conn. 1987), *rev'd* 849 F.2d 753 (2nd Cir. 1988) (hereinafter "*Healy II*").

The Commissioners of Connecticut's Department of Liquor Control, by affidavit and Declaratory Ruling issued pursuant to Conn. Gen. Stat. Section 4-176, have further restricted the State's beer affirmation provisions. The Ruling made clear that whatever the interpretation of Section 30-63a(b), out-of-state shippers, in this case brewers, need only affirm that at the time of posting in Connecticut (and *only* at the time of posting), their prices to Connecticut wholesalers are no higher than in the border states. See *Healy II*, 669 F. Supp. at 548, J.A. at pp. 171-172A.

The beer industry in Connecticut consists of three marketing levels: (1) brewers and importers; (2) wholesalers; and (3) retailers. A participant at any of the levels must hold a valid Connecticut license to sell within the State alcoholic beverages to the tier below, and ultimately to the consumers. *Healy II*, 669 F. Supp. at 545-46, J.A. at pp. 167-168A.

Appellee-brewers have contended that prices charged in package configurations offered to wholesalers in Connecticut and the bordering states vary in the several markets in Connecticut and its three bordering states. However, markets do not follow state boundaries. Furthermore, in practice there is no appropriate vehicle for a wholesaler in one state to compete through interstate marketing against a wholesaler in another state due to the nature of the national liquor distribution system under the Twenty-First Amendment and more particularly, licensing and marketing restrictions imposed under the three-tier system established independently by Connecticut and its three border states.

Notwithstanding certain institutional constraints at the wholesale level, relative to retail sales, the wholesalers ultimately compete indirectly in that Connecticut retailers, particularly near its borders, face substantial competition from retail beer outlets in the bordering states. As a result of the

operation of the existing national liquor distribution system without affirmation, Connecticut has been subject to both higher wholesale and retail prices. Consequently, many Connecticut residents have purchased beer at lower retail prices by travelling to New York, Massachusetts or Rhode Island. *Healy II*, 669 F. Supp. at 546, J.A. at p. 169A.

Beer sales in the states bordering Connecticut are regulated differently, although no less stringently, than those in Connecticut. Although there has been no evidence or argument in any of the three proceedings previously brought by Appellees relative to the comparative stringency of liquor laws in Connecticut as opposed to its bordering states. there are certain provisions in the border states that are considerably more stringent than similar provisions in Connecticut such as a New York requirement that certain prices be locked in for a period of six months. *See* N.Y. Alco. Bev. Cont. Law § 55-b(2) (McKinney 1987).

Moreover, Connecticut's affirmation provisions are significantly less restrictive than those in several other states, including the so-called "control states" where the state is not only in direct control of importation, wholesaling, and the establishment of prices and distribution but also itself serves as the sale market participant in regard to the wholesale purchase of alocholic beverages.

On July 25, 1984, Appellees filed a challenge in the United States District Court for the District of Connecticut to contest certain provisions of Connecticut's Liquor Control Act as revised by the state legislature in accordance with the decisions in *Seagram* and *Healy I*. *See* J.A. at p. 3A. In their complaint, Appellees alleged that the statute violated the Commerce Clause.

On August 30, 1984, Appellants answered and filed a Motion for Summary Judgment, noting that the revised Connecticut statute was drafted in accordance with the Twenty-First Amendment, prevailing judicial norms established through a long line of cases including *Seagram* and the decision of the District Court of Appeals in *Healy I*. *See* J.A. at p. 20A.

Appellees opposed Appellants' Motion For Summary Judgment and filed a Cross-Motion For Summary Judgment on February 23, 1985. *See* J.A. at p. 137A.

On September 19, 1984, the Wine & Spirits Wholesalers of Connecticut, Inc., filed a motion to intervene in the District Court action, based in part on the fact that the beer price affirmation provisions challenged by the Appellees were substantially similar in language and effect to Connecticut's affirmation provisions pertaining to alcohol and spirits. *See* J.A. at p. 114A. Said motion to intervene was granted and subsequently on February 13, 1985, Intervenor-Appellants filed a memorandum in support of Appellants' Motion For Summary Judgment. *See* J.A. at p. 123A.

On September 11, 1987, the District Court granted Appellants' motion for summary judgment and denied Appellees' motion for summary judgment. *See* J.A. at p. 165A. Appellees filed a notice of appeal on October 13, 1987. *See* J.A. at p. 187A.

On June 13, 1988, the United States Court of Appeals for the Second Circuit reversed the decision of the District Court. *See* J.A. at p. 189A. A Notice Of Appeal was filed in the U.S. Supreme Court by Appellants John F. Healy, et al. on June 29, 1988 and by Appellants Wine and Spirits Wholesalers of Connecticut, Inc. on July 7, 1988. *See* J.A. at pp. 208A, 210A.

SUMMARY OF ARGUMENT

Connecticut enacted its beer affirmation statute pursuant to Section 2 of the Twenty-First Amendment which grants the states clear authority to regulate the times, places and circumstances under which liquor may be sold. In addition to the clear delegation of authority to the states evidenced by the language of the Twenty-First Amendment, both the history and purpose of this constitutional provision provide a compelling indication of legislative intent to confer upon the states the power to regulate trade in liquor. It is also well established that a state retains broad regulatory powers under the Twenty-First Amendment, including those to absolutely prohibit the importation or distribution of liquor within its borders. The Twenty-First Amendment created an exception to the normal operation of the Commerce Clause. Connecticut's beer affirmation provisions were enacted pursuant to an express delegation of power to the states under the Twenty-First Amendment. The Twenty-First Amendment cannot be argued away.

As a legislative enactment, the Connecticut statute is entitled to a presumption of validity. Moreover, courts should exercise an appropriate level of judicial restraint in analyzing the wisdom and utility of a state statute, particularly in light of the Twenty-First Amendment. The Court should not sit as a super legislature to weigh the wisdom of legislation.

The Court should also give appropriate deference to judicial precedent as established in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). The New York statute upheld in *Seagram* was far more restrictive and onerous than the Connecticut statute. In *Seagram*, under circumstances similar to this case, the Court found that the Appellant's claims of economic harm were conjecture and speculative. *Seagram* is stare decisis and for the reasons stated in *Seagram*, the Connecticut statute should be upheld.

Connecticut's beer affirmation statute is constitutionally valid on its face. The amended Connecticut statute only requires that out-of-state shippers post their prices for the following month and that the price at the moment of posting in Connecticut is no higher than the lowest price offered to

wholesalers in any of Connecticut's border states. A price change in any state subsequent to posting in Connecticut is not a violation of Connecticut law.

Under the first prong of the *Pike v. Bruce Church*, 397 U.S. 137 (1970) test, the Connecticut statute passes constitutional scrutiny in that price changes in border states do not constitute a violation of Connecticut law. In contrast to the New York ABC law struck down in *Brown-Forman Distillers v. N.Y. State Liquor Authority*, 476 U.S. 573 (1986), Connecticut's beer affirmation law does not regulate prices in other states. Furthermore, the Connecticut statute does not discriminate in favor of in-state economic interests over out-of-state interests because Connecticut has no in-state brewers. In short, the Connecticut statute does not regulate or discriminate against interstate commerce.

The Connecticut statute is constitutional as applied in that it places only incidental and indirect burdens on interstate commerce. The statute survives challenge under the second prong of the *Pike* test which balances local benefits derived from the statute against the indirect or incidental burdens on interstate commerce. Connecticut maintains legitimate state interests and purposes served by its affirmation statute. Insignificant and indirect extraterritorial effects will not invalidate a statute under the Commerce Clause. *See Healy II*, 669 F.Supp. 543; *Brown-Forman v. Tennessee Alcoholic Beverage Comm'n.*, Nos. 87-5870/5913, slip op. at 10a (6th Cir. Nov. 4, 1988).

Even if market distortions in buying patterns or pricing exist as a result of the Connecticut statute, Appellees have never demonstrated any quantifiable economic injury despite countless opportunities to do so. The evenhanded operation of the Connecticut affirmation statute and resulting local benefits clearly outweigh any incidental or speculative burdens on interstate commerce.

The amended Connecticut affirmation statute eliminates all but incidental extraterritorial effects. Although the brewers are free to change prices in any other state at any time, the

Second Circuit Court of Appeals found that the Connecticut statute interferes with the brewers' ability to set prices in some of the bordering states due to interaction with regulatory restrictions in those states. Connecticut has done all that it can to eliminate any extraterritorial effects of its affirmation statute by explicitly permitting price changes in other states. This is consistent with the Court's ruling in *CTS Corp. v. Dynamics Corp. of America*, 107 S.Ct. 1637 (1987).

In attributing extraterritorial effects to the Connecticut statute based upon its interaction with other states' liquor regulations, the Second Circuit in effect affixed the operation of other state statutes to the Connecticut statute. Not only does this "through the looking glass" analysis impose impermissible extraterritorial effects of other states' statutes upon Connecticut, but this reasoning also encourages the anomalous, but perhaps unintended, result of legitimizing legislation based upon the principle of "first in time, first in right." Connecticut maintains a plethora of legitimate state interests to regulate the distribution of alcohol within its borders, not the least of which is to insure that its wholesalers, retailers and consumers be treated equitably by receiving prices for alcoholic beverages similar to those received by counterparts in neighboring states.

Connecticut's beer affirmation statute is in harmony with both the Twenty-First Amendment and Commerce Clause. The Twenty-First Amendment has mandated the creation of fifty state liquor markets established along geographical boundaries. Within this framework of fifty "artificial" state markets, the brewers without appropriate state regulation would be in a position to fix prices on a state-by-state basis.

Under the guise of espousing free market competition, the brewers have attempted to turn both the Commerce Clause and Twenty-First Amendment on their head and instead institutionalize state-by-state price discrimination along geographical state borders. In effect, the brewers wish to coronate themselves as self-regulating price dictators in an otherwise heavily regulated liquor industry, effectively sanc-

tioning the subsidization of lower prices in one state "market" by charging higher prices in another state "market."

Connecticut's affirmation statute avoids the institutionalization of this inherently inequitable price discrimination. The brewers have never put forward a tenable explanation of why Connecticut wholesalers, retailers and consumers are charged higher prices for liquor than their counterparts in less concentrated markets in neighboring states. Connecticut wholesalers, having traditionally been charged higher prices than their neighboring counterparts, have been clearly victimized by this price discrimination.

Connecticut's affirmation statute eliminates the institutionalization of unjustifiable privilege for wholesalers protected by statewide pricing laws in "privileged" states, which contain certain highly concentrated markets. The laws in those states mandating statewide prices for the distribution of alcoholic beverages arguably have impermissible extraterritorial effects through the institutionalization of artificial price subsidization by consumers in "non-privileged" states. In contrast, as a valid expression of Connecticut's legislative authority under the Twenty-First Amendment, the Connecticut affirmation statute insures evenhanded competition consistent with the spirit of the Commerce Clause. In short, the Connecticut statute is in harmony with the Twenty-First Amendment's Commerce Clause of the U.S. Constitution.

ARGUMENT

I. THE TWENTY-FIRST AMENDMENT TO THE U.S. CONSTITUTION SANCTIONS CONNECTICUT'S LIQUOR CONTROL ACT INCLUDING ITS BEER AFFIRMATION PROVISIONS.

A. History and Purpose of the Twenty-First Amendment.

The second section of the Twenty-First Amendment provides that "the transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." In addition to the clear delegation of authority to the states evidenced by the aforementioned language, the Court has noted in dissent that both the history and purpose of the Twenty-First Amendment provide a compelling indication of legislative intent to confer upon the states the power to regulate trade in liquor. *324 Liquor Corp., DBA Yorkshire Wine & Spirits v. Duffy, et al.*, 479 U.S. 335, 354 (1987) (O'Connor, J., dissenting), (hereinafter *324 Liquor*).

Prior to the adoption of the Twenty-First Amendment, there was an intricate and lengthy history of state and federal legislation respecting intoxicating liquor and resulting litigation under the Commerce Clause. *Bacchus Imports, Ltd. et al. v. Dias, Director of Taxation of Hawaii, et. al.*, 467 U.S. 263, 281 (1983) (hereinafter "Bacchus"); *See also United States v. Hill*, 248 U.S. 420 (1919); *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311 (1917); *In re Rahrer*, 140 U.S. 545 (1981); *Leisy v. Hardin*, 135 U.S. 100 (1890); *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465 (1888); *Walling v. Michigan*, 116 U.S. 446 (1886); *License Cases*, 5 How. 504 (1847), *overruled, Leisy v. Hardin, supra*.

During this period the Commerce Clause had effectively prevented states from unilaterally banning the local sale of intoxicating liquors from out of state. *Leisy v. Hardin*, 135

U.S. 100, 125 (1890). Nonetheless, Congress acting pursuant to its plenary power under the commerce clause, essentially conferred that authority to regulate trade in liquor back to the states and the Supreme Court upheld that exercise of congressional power. *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311 ____, 327(1917).

The Eighteenth Amendment, ratified in 1919, prohibited the manufacture, sale, and transportation of intoxicating liquors for use as a beverage, and expressly conferred concurrent power to enforce the prohibition on Congress and the several states.

Section 1 of the Twenty-First Amendment, ratified in 1933, repealed the Eighteenth Amendment. However, the constitutional authority of the states to regulate commerce in intoxicating liquors did not revert to them until the passage of section 2 of the Twenty-First Amendment. *Bacchus*, 467 U.S. at 281.

A legislative history of the Twenty-First Amendment suggests that the Senate considered the question of 'states rights' relative thereto in great detail. *324 Liquor*, 479 U.S. at 354-6. Taking notice of the evisceration of a proposed section 3 to the amendment which would have granted the Federal Government concurrent authority over some limited aspects of the commerce of liquor, a dissenting opinion of this Court has noted that those "Senate discussions clearly demonstrate an intent to confer on States complete and exclusive control over the commerce of liquor." *Id.* at 354.

It is equally clear that the broad grant of express authority to the states in section 2 of the Twenty-First Amendment conferred upon the states the power to determine the manner of transportation or importation of liquor into each state, and even authorized complete prohibition of alcoholic beverages within a state. Moreover, the purpose of this constitutional amendment, to specifically transfer this authority from the federal government to the states, is evident from the Senate's debate concerning same.

As consistently held by this Court, "[the Twenty-First Amendment] bestowed upon the states broad regulatory power over the liquor traffic within their territories." *United States v. Frankfort Distilleries*, 324 U.S. 293, 299 (1945); *Cf. Nippert v. Richmond*, 327 U.S. 416, 425, n. 15 (1946). The Court further noted in *324 Liquor*, "just two Terms ago we took occasion to reiterate that a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 330 (1964) (hereinafter "Hostetter"); *See State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *Zifferin, Inc. v. Reeves*, 308 U.S. 132 (1939); *California v. Washington*, 358 U.S. 64 (1958); *Cf. Indianapolis Brewing Co. v. Liquor Comm'n*, 305 U.S. 391 (1939); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939).

B. Total Prohibition by State Sanctioned by the Twenty-First Amendment.

Given the unambiguous language of section 2, the Court has ruled that a total prohibition of alcoholic liquors by a state under the Twenty-First Amendment would not violate the commerce clause. *Hostetter*, 377 U.S. 224, 330 (1964). Surely, a state acts within its constitutional authority in promulgating a statute such as Connecticut's affirmation law with clearly a lesser degree of regulation than total prohibition. *See Bacchus*, 467 U.S. at 283.

This Court has further stated that it is well established that a state has broad power under the Twenty-First Amendment "to regulate the times, places and circumstances under which liquor may be sold." *New York State Liquor Authority v. Bilanca*, 452 U.S. 714 (1981); *See also Duran v. Salem, Inc.*, 422 U.S. 911 (1975); *Zifferin, Inc. v. Rives*, 308 U.S. 132 (1939); *California v. LaReau*, 409 U.S. 109 (1972). In *Healy II*, the

District Court noted, in quoting *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980) (hereinafter "*Midcal*") that section 2 of the Twenty-First Amendment "grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Healy II*, 669 F. Supp. at 549, J.A. at p. 175A.

The District Court correctly concluded that because a state may entirely exclude alcoholic beverages from its markets, less restrictive forms of regulations are within a state's authority, *Healy II*, 669 F. Supp. at 549, J.A. at p. 175A. *See also State Board of Equalization v. Young's Market Company*, 299 U.S. 59, 62-63 (1936) (although under traditional commerce clause limitations it could not ban the sale of other products). *See Baldwin v. G.A.F. Seelig, Inc.* (hereinafter "Seelig"), 294 U.S. 511. Likewise, a state would not necessarily be free to impose similar restrictions with respect to milk. *Healy II*, 669 F. Supp. at 599. *See also Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976).

C. Exception to Normal Operation of Commerce Clause.

Nevertheless, as the Supreme Court observed in *Craig v. Boren*, 429 U.S. 190 (1976), "this court's decision . . . (has) confirmed that the (Twenty-First Amendment) primarily created an exception to the normal operation of the Commerce Clause." *Id.* at 206.

Since its adoption, the Twenty-First Amendment has remained the governing force in granting states the right to regulate the sale of liquor within their borders. As recently as September, 1984, Judge Friendly of the Second Circuit noted:

> "Some of us who were present at the creation" of the Twenty-First Amendment . . . the Twenty-First Amendment was designed to end the "noble experiment" by which the federal government endeavored

> to control the drinking habits of all citizens and place control of alcoholic beverages in the states. Fulfillment of the latter purpose required that, in addition to repealing the Eighteenth Amendment, which was accomplished by Section 1, the amendment gives the states full authority to deal with the subject of intoxicating liquor free from limitations imposed by the Commerce Clause, which had hampered such regulation before the Eighteenth Amendment was adopted. This was accomplished by Section 2 of the Twenty-First Amendment which provides: "the transportation or importation in any state, territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby, prohibited."

Jack R. Battipaglia and Bacchus Selections, Inc. v. New York State Liquor Authority, No. 84-7168 (2d Cir. 1984).

D. Analysis of Interaction of Twenty-First Amendment and Commerce Clause Based upon Express Delegation of Power.

The District Court properly concluded that in discussing the Twenty-First Amendment and the Commerce Clause "each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case." *Healy II,* 669 F. Supp. at 550, quoting *Brown-Forman Distillers Corp. v. New York State Liquor Authority,* (hereinafter "Brown-Forman"), 476 U.S. 573, 2084 (1986), quoting *Hostetter,* 377 U.S. at 332; *See Midcal,* 445 U.S. at 109 (what is required in this area is a pragmatic effort to harmonize state and federal powers).

Applying Justice O'Connor's analysis from the dissent in *324 Liquor,* the proper inquiry is not whether the State of Connecticut chose wisely in enacting its beer affirmation provisions, nor whether the State's motivation was linked to a

central purpose of the Twenty-First Amendment. The sole "question is whether the provision in this case is an exercise of a power expressly conferred upon the states by the Constitution," quoting (Stevens, J, dissenting in *Bacchus*, 468 U.S. at 287).

Appellees maintain that the Twenty-First Amendment does not authorize the states to interfere with commerce in other states. As the District Court correctly found, and as discussed herein, Connecticut's affirmation statute does not in any way interfere with commerce in other states. Appellees' claims to the contrary are spurious. Thus, notwithstanding Appellees' wishes to the contrary, the Twenty-First Amendment has a direct bearing in affirming the constitutionality of Connecticut's beer affirmation statutes. The Twenty-First Amendment cannot be argued away.

II. CONNECTICUT'S AMENDED BEER AFFIRMATION STATUTE WITHSTANDS SCRUTINY UNDER THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION.

A. Presumption of Validity and An Exercise of An Appropriate Level of Judicial Restraint Relative to Connecticut's Beer Affirmation Statute.

In contemplating whether a statute, such as Connecticut's beer affirmation statute, is constitutional, legislation is presumed constitutional unless clearly shown not to be so. *Healy II*, 669 F. Supp. at 548-549.

As the District Court correctly concluded, judges should not, in the exercise of the judicial function, undertake to second guess the political judgment of legislatures. *Healy II*, 669 F. Supp. at 548. Thus, the District Court held that judges *must* [emphasis added] refrain from reading their own policy preferences into the Constitution by striking down legislation

deemed to be unwise or even foolish. *Id.* This comports with a great volume of cases where the courts have enunciated the fundamental rule that there is a presumption in favor of the constitutionality of a legislative enactment. *Hodel v. Indiana*, 101 S. Ct. 2376, 2387 (1980). Moreover, every reasonable presumption must be indulged in favor of the validity of a statute. *Home Tel. & Tel v. Los Angeles*, 211 U.S. 265, 281 (1908). Where a relationship exists between a statute and its articulated objectives or purposes, it is not the function of the judiciary to challenge the wisdom of a state statute. *Norfolk Southern Corp. v. Oberly*, 822 F. 2d 388, 404 (1987). The District Court recognized the presumed validity of Connecticut's beer affirmation statute and exercised an appropriate level of judicial restraint in upholding same.

Dating back to 1952, the Supreme Court noted "we do not sit as a super legislative to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). Additionally, in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), (hereinafter *Seagram)* the Supreme Court found that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies who are elected to pass laws . . . it is up to the legislature, not the courts to decide on the wisdom and utility of legislation." *Id.* at 47; *Ferguson v. Skrupa*, 372 U.S. 726, 728-730 (1963). This is consistent with the Court's inclination to adhere to principles of judicial restraint.

As the Court noted in *Vance v. Bradley*, 440 U.S. 93, 112 (1979), "when the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . no less than debates over the wisdom of other socioeconomic legislation . . . are not to be carried out in the federal courts." As recently as 1987, the court reaffirmed this position: "the Constitution does not require the states to subscribe to any particular economic theory. We are not inclined to second guess the empirical judgments of lawmakers concerning the utility of legislation."

Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 679 (1981); *see also, CTS Corp. v. Dynamics Corp. of America*, 107 S. Ct. 1637 (1987).

In short, "a law can be both economic folly and constitutional." *CTS Corp.*, 107 S. Ct. at 1653. Of at least equal significance, Connecticut's affirmation law comports with the Supreme Court's dispositive ruling on liquor affirmation legislation in *Seagram*.

B. Stare Decisis in Seagram Substantiates The Constitutionality and Validity of The Connecticut Affirmation Statute.

In *Seagram*, the Supreme Court upheld the constitutionality of a New York posting and affirmation statute far more restrictive than the statute at issue. The New York statute in that case required that the monthly price schedules for sales to wholesalers and retailers, as filed with the New York State Liquor Authority, be accompanied by an affirmation that "the bottle and case price of liquor . . . is no higher than the lowest price" at which sales were made anywhere in the United States during the preceding month. *Seagram*, 384 U.S. at 39-40.

In upholding the constitutionality of the New York law, the Court noted that the case concerned liquor "destined for use, distribution, or consumption in the state of New York," *Id.* at 42. The Court held that "the Twenty-First Amendment demands wide *latitude* [emphasis added] for regulation by the state." *Id.*

The Court reasoned that New York could "constitutionally insist" that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country. *Id.* at 43. Holding for the state, the Court added that the Appellant's argument that the statutes would have a discriminatory effect on their businesses outside the state were largely "conjecture" and that "the mere fact that state action

may have repercussions beyond state lines is of no judicial significance so long as the action is not within the domain which the Constitution forbids." *Id.* at 43. As in *Seagram*, Appellants in this appeal assert alleged economic injury that calls for conjecture and speculation.

In *Seagram*, this Court declined to strike down a New York statute because, among other reasons, the Appellants in *Seagram* had failed to demonstrate quantified economic harm. The Appellees in this appeal appear before this Court, more than twenty years later, making the same claims of theoretical and speculative economic injury. As in *Seagram*, Appellees ask this Court to strike down an affirmation statute based on "conjecture." For the reasons stated in *Seagram* alone, Appellees' challenges, based on speculative economic harm, should be dismissed.

Seagram has never been overruled and is both stare decisis and the dispositive statement on state liquor affirmation provisions. If it has been somewhat modified by the Supreme Court in *Brown-Forman*, said modifications have no effect on the constitutionality of the Connecticut affirmation statute under the strict limitations set forth therein.

C. Connecticut's Beer Affirmation Statute Is Constitutionally Valid on Its Face.

In *Brown-Forman Distillers v. N.Y. State Liquor Authority*, 476 U.S. 573, 106 S. Ct. 2080 (1976), Justice Marshall suggested that the Court "has adopted what amounts to a two-tiered approach to analyzing state economic legislation under the Commerce Clause." 106 S. Ct. at 2084. Under the two-tier criteria established under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (hereinafter "*Pike*"), the "per se" invalid prong of the test examines whether a state statute directly regulates or discriminates against interstate commerce or in effect favors in-state economic interests over out-of-state economic interests. A statute that directly regulates

or discriminates against interstate commerce would be struck down "per se" without further inquiry. *Id.*

The District Court applied the "per se" standard enunciated in *Brown-Forman* to Connecticut's affirmation statute and correctly found that the statute did not directly regulate or discriminate against interstate commerce. *Healy II*, 669 F. Supp. at 553. Under the current Connecticut law, shippers must post their price schedule, hold it for the next full month, and affirm that the price, *at the time of posting* [emphasis added], is no higher than the lowest price offered to wholesalers in other states bordering Connecticut. Conn. Gen. Stat. Section 30-63b(b). Since posting occurs at a precise moment in time, it is clear that the Connecticut law is not keyed to any prospective or retroactive time span and thus does not in any way inhibit price changes by an out-of-state shipper at any time. Moreover, Conn. Gen. Stat. Section 36-63b(e) specifically provides:

> This section (affirmation) shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any such time during the calendar month covered by such posting.

Clearly a price change by a shipper in another state is not a violation of Connecticut law. The Connecticut statute does not prohibit price changes in other states, nor purport to influence or regulate prices in other states. In fact, the Connecticut statute expressly invites out-of-state shippers to change prices in other states at any time. *See* Conn. Gen. Stat. Section 30-63b(e). This eliminates the Appellees' argument that Connecticut law facially manifests an impermissible extraterritorial effect as further discussed infra. Indeed, at one time, Appellees in the pending case withdrew their argument on this point. *See Healy II*, 669 F. Supp. at 553, J.A. at p. 172A.

Moreover, there is no possibility that Connecticut's affirmation law regulates prices in other states. This is in contrast to the Court's finding that the New York ABC law, struck down in *Brown-Forman*, had an overall effect to directly regulate prices in other states.

For instance, if the lowest price for a case of X brand beer in New York, Rhode Island, and Massachusetts is $10.00 at 10:00 a.m. on January 6 (time of posting in Connecticut; *See 7 Reg. Conn. Agencies, Liq. Cont.* Sec. 30-6-B4a, then the price for that same item in Connecticut must be affirmed at $10.00 or less for sale in Connecticut under Connecticut law. If at any time subsequent to that posting, the price of a case of X brand beer is changed to $9.00 in one of the border states, Connecticut law is not violated, nor does it prevent such a price change in another state.

Appellees maintain that Connecticut law prevents brewers from changing their prices in Massachusetts, New York and Rhode Island. It is not Connecticut law that prevents a price change, although there may be restrictive laws or regulations within those other states which prevent such changes.

The District Court correctly concluded that "under *Seagram*, Connecticut's affirmation statute is facially valid" because, unlike the version in *Healy I* and *Brown-Forman*, it leaves brewers free to raise or lower prices in the border states before and after posting in Connecticut and does not, therefore, regulate interstate commerce. *Healy II*, 669 F. Supp. at 553.

Connecticut's beer affirmation law also does not discriminate by favoring in-state economic interests over out-of-state interests. Connecticut's Posting and Affirmation statutes are designed in such a way that the wholesaler, retailer and consumer pay prices that are fair and competitive with their counterparts in border states. Furthermore, Connecticut's law does not protect in-state industry at the expense of out-of-state industry, because Connecticut has no in-state brewers. Cf. *Seelig*, 294 U.S. 511 (1935).

The Sixth Circuit has recently upheld the constitutionality of a liquor affirmation statute similar to the Connecticut statute. In *Brown-Forman Corporation v. Tennessee Alcoholic Beverage Commission*, Nos. 87-5870/5913 (6th Cir. Nov. 4, 1988), the court upheld the constitutionality of Tennessee's liquor affirmation law — a law similar to Connecticut's affirmation law which is at issue in this appeal.

The Tennessee law was challenged on the grounds that the practical effect of the law was to control liquor prices in other states. The Tennessee law, like Connecticut's, is a liquor affirmation statute which requires that a manufacturer of alcoholic beverages may not charge or quote a price that is higher than any wholesale price currently charged by the manufacturer in any other state. The Tennessee statute is arguably more onerous than the Connecticut law in that the Tennessee law references prices nationwide, while the Connecticut statute only references prices in Connecticut's border states. The Sixth Circuit Court of Appeals nevertheless found that Tennessee's affirmation law did not make price changes in other states illegal nor purport to regulate prices in other states. The court consequently found that the Tennessee statute is constitutional.

The Sixth Circuit reasoned that although the Tennessee statute may arguably discourage out-of-state price reductions in that such price changes must be replicated in Tennessee, the statute is constitutional because it does not prohibit price changes in other states. *Brown-Forman v. Tennessee*, Nos. 87-5870/5913, slip op. at 12a. Thus the Court found that while the statute may have an indirect effect on manufacturers' profits in the interstate market, the statute does not prompt price changes in any other state and consequently does not directly regulate interstate commerce. *Brown-Forman v. Tennessee*, Nos. 87-5870/5913, slip op. at 12a. Similarly, Connecticut's affirmation law should be upheld in that the statute does not make price changes in other states illegal nor purport to regulate prices in other states. Conn. Gen. Stat. Section 30-63b(e).

The Sixth Circuit also found that any effect on interstate commerce resulting from an affirmation statute that purports to prohibit discriminatory prices is certainly less onerous than an absolute prohibition on the sale of liquor as sanctioned by the Twenty-First Amendment. *Brown-Forman v. Tennessee*, Nos. 87-5870/5913, slip op. at 10a. Further, the court found that such interstate effects do not necessarily invalidate a statute, especially when the products come within the purview of the Twenty-First Amendment. Nos. 87-5870/5913, slip op. at 10a, citing *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978).

Similar to the statute upheld by the Sixth Circuit, the Connecticut statute does not prohibit price changes in neighboring states. The Sixth Circuit therefore correctly concluded, as the Second Circuit should have concluded, that while such an affirmation statute may incidentally and indirectly affect the interstate liquor market, such statutes do not constitute "regulation" of liquor prices in other states.

Connecticut's legislation treats all brewers equally, so that no particular brewer, and no one particular state, is disproportionately affected by these statutes. Connecticut simply places upon all brewers desiring to sell their products in Connecticut a uniform element of market price competition, without regulating interstate prices. The state's beer affirmation statute is therefore facially valid.

D. Connecticut's Beer Affirmation Statute Is Constitutional as Applied in That it Places Only Incidental and Indirect Burdens on Interstate Commerce.

The District Court also correctly found that, in addition to being facially valid, Connecticut's beer affirmation statute passed muster under the second prong of the *Pike* two-tier standard which balances the local benefits of a statute against any indirect burdens on interstate commerce. Simply stated, "the critical consideration is the overall effect of the

statute on both local and interstate activity." *Brown-Forman*, 106 S. Ct. at 2084; *See Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440-441 (1978).

The District Court correctly discounted the Appellees' assertions that some business of Connecticut residents previously going to border state retailers would shift to Connecticut retailers and found that "some artificially" high prices (in the border states) and/or "artificially" low prices that result in Connecticut from beer price affirmation would not render the statute unconstitutional. In fact, quite to the contrary, the District Court noted that the Supreme Court has held that a state may "constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country." *Seagram*, 384 U.S. at 43; *Healy II*, 669 F. Supp. at 553.

A "non-discriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from predominantly out-of-state industry to a predominantly in-state industry." *Healy II*, 669 F. Supp. at 553, quoting *Minnesota v. Cloverleaf Creamer Company*, 449 U.S. 456 (1981). In effect, the District Court found that the disincentive to Connecticut consumers to buy outside the state (never quantified by the Appellees nor shown to be of more than minor economic significance) and the necessity that brewers set their prices in the border states knowing that they are simultaneously setting their prices in Connecticut, are not excessive burdens or intrusions on commerce. *Healy II*, 669 F. Supp. at 553. In effect, the District Court found that there was an insignificant and indirect extraterritorial effect on interstate commerce.

Furthermore, the District Court held that "because Connecticut's statute operates even-handedly and serves a legitimate purpose in reducing discrimination in pricing to wholesalers in Connecticut relative to out-of-state wholesalers, such incidental and indirect burdens on interstate commerce do not outweigh the resulting local benefits." *Id.* The Connecticut statute thereby withstands constitutional scrutiny under the second tier balancing test of the *Pike* analysis.

The District Court's opinion relative to the second tier of the *Pike* test is supported by the Sixth Circuit's decision in *Brown-Forman v. Tennessee,* supra. In applying the *Pike* balancing test to the Tennessee Liquor Affirmation Statute, the Sixth Circuit appropriately found that while the Tennessee statute may require a manufacturer to raise prices in other states in order to effectively raise prices in Tennessee, "it is by no means clear . . . that [Tenn. Code Ann. Section 57-3-202(e)] must inevitably produce higher prices in other States . . . rather than the lower prices sought for Tennessee." *Brown-Forman v. Tennessee,* Nos. 87-5870/5913, slip op. at 9a, paraphrasing *Joseph E. Seagrams & Sons, Inc. v. Hostetter,* 384 U.S. 35, 43 (1966). In balancing Tennessee's legitimate state interest against theoretical and unquantified effects on the interstate liquor market, the court found that Appellants had never produced evidence of the alleged market distortions or effects on prices in other states. Similarly, the Appellees-Brewers in this appeal have never produced a scintilla of evidence supporting their claims of market distortions or disadvantages suffered by out-of-state consumers as a result of the Connecticut affirmation statute. Despite countless opportunities in the course of the myriad of litigation on liquor affirmation statutes, the brewers and out-of-state shippers have never quantified or demonstrated any quantifiable economic harm from liquor affirmation.

It is further worth noting that the Appellees cannot claim any authority (alleged or in fact) to represent any parties who may have suffered economic harm as a result of the operation of the Connecticut affirmation statute. When the Appellees-brewers claim economic injury, it is arguably some other party's injury and not any economic harm to themselves. Specifically, Appellees have never offered any evidence that they would sell more beer without the Connecticut statute. As a result, the Appellees have never demonstrated any quantifiable economic harm in this record, or any other case involving liquor affirmation. Supported by Appellees' silence on the record, Appellants submit that Appellees have never suffered any economic harm as a result of the Connecticut affirma-

tion statute, and more than likely, have prospered during the same period.

In short, the Connecticut statute is constitutional under the *Pike* balancing test. Connecticut's numerous state interests discussed supra, clearly outweight the incidental and indirect burdens on interstate commerce and speculative and theoretical alleged economic harm.

E. The Amended Connecticut Affirmation Statute Eliminates Extraterritorial Effects.

The District Court was correct in concluding that the Connecticut statute does not directly regulate or discriminate against interstate commerce. *Healy II*, 669 F. Supp. at 533. Since posting in Connecticut occurs at a moment in time, it is clear that the Connecticut law is not keyed to any prospective or retroactive time span and thus does not in any way influence or inhibit price changes by out-of-state shippers at any time.

Notwithstanding these distinctions, the Appellees argued, and the Second Circuit Court of Appeals ruled, that an impermissible extraterritorial effect remains apparent on its face because brewers are in fact not free to change prices in other states due to regulatory restrictions in those other states. Citing the monthly price hold laws in Massachusetts, 138 M.G.L.A. Sec. 25B(d), and the 180 day hold on price reductions mandated by New York law, N.Y. Alco. Bev. Cont. Law Sec. 55-b(2) (McKinney 1987), the court found that brewers must still look ahead to consider the impact of their pricing decisions in Connecticut when making pricing decisions in Massachusetts and New York. *Healy II*, 849 F.2d at 759.

It is well settled that the practical effect is a critical element in determining whether an affirmation statute is "per se" invalid under the Commerce Clause. *Brown-Forman*, 106 S. Ct. at 2084; *See Raymond Motor Transportation, Inc. v.*

Rice, 434 U.S. at 440–441. In applying the *Pike* "per se" analysis to an affirmation statute, courts have considered whether the statute escapes the state borders to control liquor prices in other states. *Brown-Forman*, 476 U.S. at 583, citing *Southern Pacific Co. v. Arizona*, 335 U.S. 761, 775 (1945). However, in this case, Connecticut has done all that it can to remove the extraterritorial effect of its legislation and the State has been successful.

The Connecticut affirmation provisions do not bar, deter, or delay price decisions in other states. They specifically leave brewers free to select their own price levels in other states. The fact that there are regulatory restrictions on price changes in other states is a matter beyond Connecticut's control.

Connecticut eliminated extraterritorial effects of the affirmation statute by enacting the amended affirmation provisions which invite the brewers to change prices in other states at any time. Unlike the New York law in *Brown-Forman*, it is not a violation of the Connecticut statute to change prices in any other state at any time. Nor does Connecticut attempt to influence prices or pricing decisions in other states. Connecticut merely guarantees its residents the lowest price among the border states at an exact moment in time. Any extraterritorial effect is thereby eliminated. Apparently in deference to this logic, Appellees-Brewers at one point withdrew argument on this point. *Healy II*, 669 F. Supp. at 553, J.A. at p. 172A.

This position is consistent with a recent Supreme Court decision concerning an Indiana tender offer statute. In *CTS Corporation v. Dynamics Corp. of America*, 107 S. Ct. 1637 (1987), (hereinafter "CTS"), the Court held that as long as the state only regulated Indiana corporations, the Commerce Clause was not violated. 107 S. Ct. at 1649. The Court went on to discuss the Court of Appeals' analysis relating to balancing the state and federal interests. Rather than engage in a true balancing analysis, the Supreme Court simply suggested that the substantial and legitimate state interest in regulating corporate governance was permissible and emphasized that courts should exercise judicial restraint in evaluating the

wisdom of state laws that may have some impact on interstate commerce.

> The Constitution does not require the states to subscribe to any particular economic theory. We are not inclined to second-guess the empirical judgments of lawmakers concerning the utility of legislation. 107 S. Ct. at 1651.

The *CTS* opinion bears significantly on this case for two reasons. First, it indicates that the Court has employed a more limited method for evaluating Commerce Clause challenges. By focusing on protectionism, the Court has eliminated *ad hoc* balancing analyses that must inevitably weigh the incidental burdens of state legislation on interstate commerce.

Second, given the focus in *CTS* on protectionism, and away from the extraterritorial effects that frequently accompany any state legislation, the opinion suggests that courts should defer more frequently to a state's legitimate and constitutional exercise of power. To the extent that state discriminatory intent is proscribed by the commerce clause, federal courts consequently should not engage in evaluating the wisdom of state policies simply because they have some incidental interstate impact.

F. Connecticut Maintains a Plethora of Legitimate State Interests to Regulate the Distribution of Alcohol within its Borders.

Despite voluminous litigation involving Connecticut's Liquor Control Act, Appellees have never provided reasoning as to why prices should be substantially lower in three border states than in Connecticut, or conversely, why they should be much higher in Connecticut than in the border states. Connecticut maintains a plethora of legitimate state interests to regulate importation, distribution and sale of alcoholic liquor within its boundaries, not the least of which is

insuring that Connecticut wholesalers, retailers and consumers be treated equitably by receiving similar prices as their neighbors across state lines. Because the Connecticut law allows brewers to reflect additional shipping and tax costs in determining the affirmed price, there is no valid reason why brewers should charge more in Connecticut than in its three border states.

Connecticut does not seek to dictate the prices at which the brewers offer their products. Connecticut is simply insisting that its wholesalers be placed on an equal footing with wholesalers in the border states, and that they not be singled out to subsidize lower prices charged by brewers in these border states. This is similar to the mandate which seventeen "control" states with state-run liquor retail operations have given to national liquor distillers and importers, *See Seagram*, 284 U.S. at 384 U.S. at 4[9]

The Twenty-First Amendment does not grant additional legislative authority to a state simply because it declares itself to be the sole wholesaler and retailer of alcoholic beverages within its borders. Although not specifically at issue in this case, there are seventeen so-called control states where the economic reality is that the state not only monopolizes the importation, transfer and distribution of alcoholic beverages, but also itself establishes uniform prices for alcoholic beverages as a market participant. Given a state's monopoly power under those circumstances, market concentration and free market competition have little to do with pricing policies. Wholesalers, retailers and consumers of a state should not be economically penalized for a state's failure to declare itself a monopolistic participant relative to the distribution of alcoholic beverages.

It is fundamental economics that if brewers charge artificially low prices in certain arbitrarily privileged states, they will charge comparably higher prices in other states in order to achieve targeted profit margins. Acknowledging this inevitable market price discrimination, Connecticut has sought

only to insure that its consumers will not be subsidizing the lower prices being charged to consumers in bordering states.

Furthermore, markets and distribution channels involving alcoholic liquors are heavily regulated and to a great extent protected through this state-by-state licensing system. Unlike other industries, an upstart brewer/importer could not simply begin operation by manufacturing and distributing its products in the United States without first applying to and being approved by appropriate state and federal regulatory authorities. Thus, there are market entry barriers resulting from the licensing system which serve to artificially protect industry-wide giants, such as many of the appellees in this action, from competition.

Additionally, there is no constitutional right to engage in the sale of alcoholic liquors, and alcoholic liquors are clearly distinguishable from other consumer products, such as milk. See discussion of Twenty-First Amendment, *supra*.

Connecticut has a legitimate state interest in maximizing sales within its own borders in order to increase its tax revenue. Increasing state revenue is particularly important in Connecticut, where there is no state income tax, and the state must rely on a sales tax, and on such taxes as those imposed on alcohol, to fund the state budget. Furthermore, highway safety must be considered a unique factor with regards to traveling across state lines to purchase intoxicating alcohol. The state has a legitimate interest in trying to curtail buying patterns that could lead to increased danger on the highways.

There are some state activities which have been held invalid under the Commerce Clause. For example, in *Philadelphia v. New Jersey*, 437 U.S. 617 (1977), the State of New Jersey attempted to prevent out-of-state shippers from depositing their garbage in New Jersey landfills, while granting the New Jersey sources of garbage preferential treatment in being admitted to their landfill sites. In order to adjudge a state

law infirm under the Commerce Clause, the Court stated that "what is crucial is the attempt by one state to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Id* at 628.

Connecticut's affirmation law does not isolate Connecticut from its border states, but rather insures that the state is treated in harmony with neighboring states. Connecticut's affirmation statute also insures that Connecticut is not "isolated" or targeted to pay higher prices to subsidize prices charged in the border states. In a similar vein, the Connecticut legislature solely seeks to have its wholesalers, retailers and consumers treated in parity with their counterparts in its neighboring states.

In short, the Commerce Clause does not prohibit a state from enacting reasonable legislation to protect the economic interests of its citizens, even if such legislation incidentally affects interstate commerce:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Id.* at 624, citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

III. CONNECTICUT'S BEER AFFIRMATION STATUTE IS IN HARMONY WITH BOTH THE TWENTY-FIRST AMENDMENT AND THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION.

A. The Markets within the National Liquor Distribution System.

The Twenty-First Amendment has mandated the creation of fifty state markets which have been established along geographic boundaries. As the District Court noted in reality, "market areas do not always coincide with state borders." *Healy II*, 669 F. Supp. at 546.

For example, when brewers and importers establish prices in New York state, under the existing liquor distribution system, wholesalers throughout the entire state benefit from New York City's market concentration. A Connecticut wholesaler in Bridgeport, Connecticut, approximately 50 miles from New York City and arguably serving the same market as New York City, under the scheme advocated by Appellees would not have the benefit of the indigenous competitive forces at work within this market. Ironically, a Connecticut wholesaler may be arbitrarily placed at a competitive disadvantage with respect to a counterpart in Westchester, New York. Higher prices charged to a Bridgeport wholesaler would in effect subsidize lower prices charged to a wholesaler far removed geographically from the metropolitan New York City market, such as Lake George, New York. A wholesaler in Lake George, New York, which by market standards would not maintain any legitimate "competitive advantage" over a wholesaler in Bridgeport, Connecticut consequently receives artificial benefits from New York state law which ties New York City prices to Lake George prices. On the other hand, the Bridgeport wholesaler is subject to victimization through price discrimination because of the existence of the state border between Connecticut and New York. In short, market areas do not coincide with state borders and equitable pricing cannot be established by defining markets along these boundaries.

In short, the existing national liquor distribution system as regulated on a state-by-state basis is not a free market and does not afford unregulated price competition.

B. Avoidance of Institutionalization of Price Discrimination through Misapplication of The Twenty-First Amendment.

As proposed by Appellees, the institutionalization of price discrimination along state borders would turn federalism on its head by using "federal" commerce clause principles to institutionalize state-by-state price discrimination. This manipulation of the state-by-state liquor distribution system would in effect authorize each brewer or importer as an independent and unrestricted monopolist. Given that some states are themselves market participants with significant purchasing power, pricing decisions relative to non-control states would also inevitably be distorted. Pricing policies would thus be established with little regard for market concentration of competitive economic forces, but rather based upon unregulated price fixing within each state.

If the pricing system based upon artificial markets as proposed by Appellees were institutionalized, it might produce long term unintended consequences. It is entirely conceivable that nearly all, if not all the fifty states would choose to become control states in order to establish more favorable pricing policies for their consumers. At the very least, the inherent inequities of establishing pricing policies based upon geographical boundaries are readily apparent.

Short of restructuring the entire national liquor distribution system through repeal of the Twenty-First Amendment, Appellees are attempting to institutionalize market boundaries along state borders. As discussed herein, liquor markets within states become protected markets by virtue of the operation of state regulatory mechanisms enacted under the Twenty-First Amendment. Appellees are mounting this

constitutional challenge of Connecticut's affirmation laws by advocating "interstate competition" while in reality they are attempting to institutionalize intrastate uniform price-fixing. Advocating competition between states would be an inappropriate misapplication of the commerce clause were state boundaries to actually constitute markets. It is untenable economic policy given the reality of radically different market concentrations within each state.

As applied, the same price for beer is charged to wholesalers in Lake George and New York City, despite the substantially different market concentration in New York City. The Lake George market, and other markets in the state of New York, are therefore artificially protected by the single price posting mechanism established by the State of New York. The price posted in New York State consequently has no relation to what a competitive market would dictate were the distribution of alcoholic liquors treated similarly to distribution of other products in Lake George such as milk.

Thus wrapped within the veil of sanctimonious commerce clause arguments relative to alleged extraterritorial effects of the Connecticut statute on interstate commerce, Appellees attempt to promulgate and institutionalize artificial price discrimination along state geographic borders which would itself certainly have more than incidental adverse effects on interstate commerce. The Connecticut affirmation statute exposes and ultimately eliminates the monopolistic price fixing scheme and inequitable price discrimination advocated by Appellees and instead ensures fair and evenhanded pricing to Connecticut's wholesalers. Connecticut's affirmation laws thereby enhance both the spirit and intent of the Commerce Clause.

C. The Connecticut Affirmation Statute Is in Harmony with Both The Twenty-First Amendment and Commerce Clause.

Exercising its authority under section 2 of the Twenty-First Amendment, Connecticut has attempted to inject equitable pricing policies within its borders by legislating evenhanded treatment to its wholesalers. Connecticut's affirmation statute simply prohibits artificial price discrimination within its borders.

The Connecticut affirmation statute effectively operates to enhance the Connecticut wholesaler's ability to compete in pricing with counterparts in neighboring states by requiring a level economic playing field within Connecticut's borders. Given a consumer's ability to purchase alcoholic liquor at retail outlets wherever he or she wishes, a Connecticut wholesaler that is arbitrarily charged higher prices than his counter-parts in neighboring states, regardless of proximity to certain metropolitan markets, faces inherent institutional price discrimination.

Such a pricing system places Connecticut wholesalers *a priori* at a disadvantage without any legitimate opportunity to compete with their counterparts in other states. Sanctioning the pricing system advocated by the Appellees would ultimately institutionalize permanent economic injustice by mandating artificial price discrimination.

In effect, Appellees are advocating the institutionalization of a pricing system which smacks of the failed economics of centralized economic planning. Given targeted profit margins, and institutionalized state markets with no effective competitive market forces, certain states and certain consumers would be relegated to a permanent status of price discrimination, while others would have institutionalized price priveleges. Such a system was certainly not contemplated by those who passed the Twenty-First Amendment.

Moreover, were Appellees upheld, a chorus of litigation would seemingly become inevitable. Each state's liquor provisions would then be exposed to attack under the commerce clause by aggrieved wholesalers or consumers alleging institutionalization of price discrimination from enforcement of statewide pricing mechanisms and accompanying impermissible extraterritorial effects. Should Appellees be upheld, a whole new chapter of constitutional challenges may be forthcoming.

If the Appellees in this case wish to restructure the national liquor distribution system through repeal of the Twenty-First Amendment, they certainly possess the economic resources to mount such a challenge through the legislative process. That would be more appropriate than continuous recourse to the judiciary in attempts to manipulate and erode the Twenty-First Amendment. In any event, it seems that Appellee's efforts in this case are certainly misdirected against a Connecticut beer affirmation statute which seeks to promote both Twenty-First Amendment and Commerce Clause principles by allowing the state to regulate the importation and distribution of alcoholic beverages within its borders while simultaneously enhancing fair competition and prohibiting the institutionalization of arbitrary price discrimination.

CONCLUSION

The Twenty-First Amendment sanctions Connecticut's Liquor Control Act including its affirmation provisions.

Connecticut's amended beer price affirmation provisions are constitutional under the Commerce Clause. This court should exercise an appropriate level of judicial restraint in upholding the Connecticut Statute. Moreover, *Seagram* is stare decisis in upholding the validity of the Connecticut statute. Connecticut's statute is facially valid under the *Pike* "per se" standard and withstands constitutional scrutiny under the *Pike* balancing test. The amended Connecticut statute eliminates extraterritorial effects. Balancing the plethora of legitimate state interests served by the Connecticut statute against the indirect and incidental burdens on interstate commerce, the Connecticut statute clearly withstands constitutional scrutiny under the Commerce Clause.

The Connecticut statute is in harmony with both the Commerce Clause and the Twenty-First Amendment. The Connecticut statute avoids the institutionalization of an artificial and discriminatory pricing system as advocated by the Appellees and instead legislates evenhanded competition.

For all the foregoing reasons, we respectfully request that the Court enters an order summarily reversing the decision of the United States Court of Appeals for the Second Circuit and affirming the judgment of the United States District Court for the District of Connecticut. In the alternative, if appropriate, we urge the Court to reverse the decision of the U.S. Court of Appeals for the Second Circuit and remand this case to the lower court on the sole issue of the constitutionality of the Connecticut statute as applied.

Respectfully submitted,

Wine and Spirits Wholesalers of
Connecticut, Inc.

WILLIAM A. WECHSLER
BAILEY AND WECHSLER
Counsel of Record
(A Member of the Bar of
the U.S. Supreme Court)

ALFRED F. WECHSLER
GREGORY J. SOUTHWORTH
BAILEY AND WECHSLER

66 Forest Street
Hartford, CT 06105
Telephone: (203) 525-9191

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Nos. 88-449, 88-513

IN THE

United States Supreme Court

OCTOBER TERM, 1988

JOHN F. HEALY, *et al.*,

Appellants,

v.

THE BEER INSTITUTE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLEES

JEFFREY I. GLEKEL
Counsel of Record,
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 735-3000
Attorneys for Appellee
Anheuser-Busch, Inc.

Of Counsel
Timothy G. Reynolds
Janet E. Schomer

GARY NATEMAN, ESQ.
The Beer Institute
1225 Eye Street, N.W.
Washington, D.C. 20005
(202) 737-2337
Attorney for Appellee
The Beer Institute

JEROME I. CHAPMAN
Counsel of Record,
ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700
Attorneys for Appellee
Miller Brewing Company

Of Counsel
Wayne C. Holcombe

WILLIAM H. ALLEN
Counsel of Record,
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-6000
Attorneys for Appellees
The Beer Institute,
G. Heileman Brewing Company,
The Genessee Brewing
Company, Inc.,
All Brand Importers, Inc.,
Dribeck Importers, Inc.,
Guiness-Harp Corp.,
Labatt Importers Inc.,
Martlett Importing Company, Inc.,
Monterey Bay Company, Inc., and
Van Munching and Company, Inc.

January 30, 1989

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Connecticut beer price affirmation law has the practical effect of regulating brewers' out-of-state prices in violation of the Commerce Clause.

2. Whether the decision of the court of appeals should be affirmed because the Connecticut beer price affirmation law constitutes economic protectionism in violation of the Commerce Clause by purposefully neutralizing the competitive advantages possessed by businesses and consumers in States bordering Connecticut.

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BRIEF FOR THE APPELLEES

STATEMENT OF THE CASE

This case involves the State of Connecticut's latest attempt to devise a beer price affirmation scheme that can withstand scrutiny under the Commerce Clause of the United States Constitution. Appellees, plaintiffs below, are a brewers' trade association and individual brewers and importers of beer injured by the Connecticut beer price affirmation law (the "brewers").[1] Appellants, defendants below, are the Connect-

[1] The listing required by Supreme Court Rule 28.1, naming all parent companies, non-wholly-owned subsidiaries and affiliates of appellees, is contained in the Appendix to appellees' Motion for Summary Affirmance, previously filed in this Court. The present members of The Beer Institute are: Anheuser-Busch, Inc.; G. Heileman Brewing Company; Latrobe Brewing Company; Miller Brewing Company; and the Stroh Brewing Company. Pabst Brewing Company is no longer a member of The Beer Institute.

icut officials responsible for enforcing the statute ("Connecticut") and an intervenor liquor wholesalers' trade association.

The Connecticut law at issue here and its predecessor, which was declared unconstitutional in *United States Brewers Ass'n, Inc. v. Healy*, 464 U.S. 909 (1983), *aff'g per curiam*, 692 F.2d 275 (2d Cir. 1982), *rev'g* 532 F. Supp. 1312 (D. Conn. 1982) ("*Healy I*"), were both adopted to deal with the same problem. Even though brewers' prices to Connecticut wholesalers were not the highest in the four-state area, the retail price of beer has historically been higher in Connecticut than in the bordering States of Massachusetts, New York and Rhode Island. *Healy I*, 532 F. Supp. at 1320; Conn. Br. 6; Wholesalers Br. 8. As a result, Connecticut residents living in border areas have crossed state lines to purchase beer in other States at lower prices. Since 1981, the Connecticut legislature has sought to eliminate the price advantage available in bordering States by a combination of price posting (requiring brewers to state their prices during a future period in Connecticut) and price affirmation (linking the maximum brewer price in Connecticut to the brewer's minimum price for the same item anywhere in any bordering State). Both the original Connecticut statute and the current statute have the same purpose — to eliminate the availability of beer at lower prices in the bordering States — and the same practical effect — to control the brewers' pricing decisions in those States.

Connecticut law requires brewers to post prices on the sixth of each month to take effect on the first of the following month, and further requires that all sales during the month be at the posted prices then in effect. In addition, under the first version of the price affirmation law, brewers were required to affirm at the time of posting that their posted prices were no higher than the lowest prices they would charge during the effective period for comparably packaged items in States bordering Connecticut. This Court declared Connecticut's first beer price affirmation law unconstitutional in *Healy I*. In the opinion accompanying the judgment that the Court summarily affirmed, the Second Circuit noted that the law had the

practical effect of controlling for each future month the prices that brewers could charge to wholesalers in other States. For that reason the statute was at odds with "well-established Commerce Clause principles [that] prohibit the state from controlling the prices set for sales occurring wholly outside its territory." 692 F.2d at 282.

In 1984, the Connecticut legislature adopted certain technical amendments to the beer price affirmation law purporting to correct the constitutional deficiencies found in *Healy I*. The amendments were flawed. On its face the amended law still expressly prohibited the brewers from charging prices in Connecticut that were higher than their lowest prices in the bordering States during the effective period of any posting. Finally, after the present suit was filed, Connecticut submitted in the form of an affidavit a "Declaratory Ruling" of the Connecticut Department of Liquor Control purporting to eliminate the express prohibition on reducing out-of-state prices after posting in Connecticut. Under this Ruling, the brewers are now required to affirm that, contemporaneously with the time of posting, their posted prices (for the following month) are no higher than their current lowest prices for comparably packaged items in any of the bordering States. Even as modified by the Declaratory Ruling, Connecticut's price affirmation law still impermissibly restricts the brewers' freedom to set prices for their products in other States based on competitive or marketing conditions in those States.

The facts relevant to this appeal were not disputed in the district court.

A. Beer Marketing in Connecticut and Surrounding States

The beer industry in Connecticut and its three bordering States has three marketing levels: brewers and importers of beer, wholesalers, and retailers. Some brewers market national brands, such as Budweiser and Miller High Life. Others market regional or local brands, and sometimes confine the sales thereof to limited portions of the four-state area. Brewers and importers ship all beer into Connecticut; no breweries

are located in that State. *United States Brewers Ass'n v. Healy*, 669 F. Supp. 543, 545-46 (D. Conn. 1987), J.A. 165A, 167A-168A, *rev'd sub nom. In re Beer Institute*, 849 F.2d 753 (2d Cir. 1988) (*"Healy II"*), J.A. 189A.[2] Connecticut wholesalers and retailers, on the other hand, are typically local Connecticut enterprises.

Each of these marketing levels is highly regulated in Connecticut. Wholesalers have exclusive territories, *i.e.*, a retailer may purchase each brand of beer from only one designated Connecticut wholesaler. *See* Conn. Dep't Liquor Control Reg. 30-6-B7. A wholesaler must charge each of its retail customers the same price for each product regardless of volume sold and regardless of the competitive conditions confronted by the wholesaler. Conn. Gen. Stat. Ann. § 30-63(b) (West Supp. 1988). Brewers can sell beer to wholesalers only at a uniform statewide price posted with the liquor commission on the sixth day of the preceding month, and they cannot change that price until the posted price for the next month takes effect. *Id.* § 30-63(c). Connecticut law also prohibits brewers from offering price discounts, requires any price change to remain in effect for at least one month and requires uniform prices to all wholesalers throughout Connecticut. *Id.* §§ 30-63(b)-(c).

Contrary to the assertion of the Wholesalers, Br. 9, beer sales are less stringently regulated in the States bordering Connecticut. For example, each of the bordering States allows brewers to offer price discounts and other inducements to wholesalers. *Healy I*, 532 F. Supp. at 1319 & n.29. In addition, both New York and Rhode Island allow brewers to charge different prices to wholesalers depending on volume sold and other competitive conditions. *Id.* at 1319. Moreover, New York, unlike Connecticut, does not require that wholesalers be given exclusive territories. Rule 9(c) Statement of

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[2] Citations to "J.A. _____" are to the Joint Appendix filed with this Court in connection with this appeal.

Plaintiffs In Support of Their Cross-Motion for Summary Judgment 4, J.A. 140A.[3]

As acknowledged by appellants, Connecticut retailers, particularly near the border, suffer in their competition with bordering-state retailers, because retail beer prices are generally higher in Connecticut than in the bordering States. *Id.* at 6, J.A. 141A. "Connecticut residents have crossed state borders in significant numbers to purchase beer in other States at lower retail prices." Conn. Br. 6-7; Wholesalers Br. 9; *see also Healy I*, 532 F. Supp. at 1320, 692 F.2d at 276; *Healy II*, 669 F. Supp. at 546, J.A. 169A.

B. Price Affirmation

Appellants concede that the purpose of the beer price affirmation statute was to increase the purchase of beer by Connecticut residents within the State by eliminating lower beer prices in neighboring States. Conn. Br. 6-7, 19, 23; *see also Healy I*, 692 F.2d at 276; *Healy II*, 849 F.2d at 755, J.A. 192A.

1. *The 1981 Act*

Connecticut first enacted beer price affirmation in 1981 to protect its local retailers and wholesalers from out-of-state competition. Wholesalers Br. 14, 32-35. The 1981 amendment to the Connecticut liquor pricing statute prohibited brewers from selling beer in Connecticut at a price higher than the lowest price "at which such item is then being sold" in any neighboring State. Conn. Gen. Stat. Ann. § 30-63a(b) (West Supp. 1981). In addition, the 1981 amendment required brewers, at the time of posting, to file a written affirmation under oath that the posted price of beer to wholesalers in Connecticut would be no higher than the lowest price at which comparably packaged beer "is or will be" sold to wholesalers in any State bordering Connecticut during the month covered by the posting. *Id.*, former § 30-63b(b). In calculating the lowest out-of-state price during the period of posting, all

[3] Facts cited herein from Plaintiffs' Rule 9(c) Statement were not disputed by appellants.

discounts, rebates and allowances offered in the neighboring States had to be included. *Id.*, former § 30-63c(b). The only price differentials allowed were differences in state taxes and actual delivery costs. *Id.*

2. *Healy I*

Certain of the current plaintiffs-appellees filed suit in United States District Court for the District of Connecticut challenging the 1981 statute as unconstitutional under the Commerce Clause. The brewers contended, *inter alia*, that the statute was invalid because of its extraterritorial effects, because it was intended and operated as "simple economic protectionism" and because any possible intrastate benefits were outweighed by the harm to interstate commerce. Relying primarily on *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), the district court upheld the statute. *See Healy I*, 532 F. Supp. 1312 (D. Conn. 1982).

On appeal, the Second Circuit reversed. *See Healy I*, 692 F.2d 275 (2d Cir. 1982). The court of appeals found the Connecticut statute unconstitutional on its face because the statute had the practical effect of prohibiting a brewer from selling beer in any neighboring State at a price below what it had previously posted in Connecticut. As the court explained:

> Nothing in the Twenty-first Amendment permits Connecticut to set the minimum prices for the sale of beer in any other state, and well-established Commerce Clause principles prohibit the state from controlling the prices set for sales occurring wholly outside its territory.

Id. at 282. This Court summarily affirmed. 464 U.S. 909 (1983).

3. *Amendments Following Healy I*

In response to *Healy I*, in 1984 the Connecticut legislature amended its beer price affirmation statute to its current form. The stated purpose of the legislature was to correct the deficiencies found in *Healy I*. Conn. Br. 18; *see Healy II*, J.A. 193A. The underlying purpose of fostering Connecticut

wholesale and retail businesses at the expense of bordering-State businesses and consumers remained the same.[4] As Connecticut later recognized, however, the 1984 amendments left the key provision, Section 30-63a(b), unchanged, so that by its express terms the amended statute had the same effect as the prior law of directly controlling future prices in the bordering States. *See* Conn. Br. 7 n.2; Brief on Defendants' Motion for Summary Judgment, or in the Alternative, Motion for Stay 5-6, J.A. 90A-91A.

After the 1984 amendments, the Connecticut price affirmation law stood as follows: Section 30-63a(b) continued to make it illegal for brewers to sell beer in Connecticut at a price higher than the price at which beer is or will be sold in any bordering State during the month covered by the posting. Section 30-63b(b) had been changed; it now required brewers to affirm that the prices they were posting were no higher than prices in other States at the time of the Connecticut posting. Section 30-63b(e) provided that "[t]his section" — *i.e.*, section 30-63b — did not prohibit brewers from changing their out-of-state prices. This provision did not, however, mention section 30-63a(b), which clearly prohibited brewers from reducing bordering-state prices below the prices they had affirmed and posted in Connecticut.

C. Procedural History of the Current Litigation

The brewers again filed suit in the United States District Court for the District of Connecticut seeking a declaration that the revised Connecticut statutory scheme was unconstitutional and requesting an injunction against its enforcement. The complaint alleged that the Connecticut beer price affirmation statute regulated out-of-state transactions, constituted

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[4] *See also* Defendants' Memorandum In Opposition at 11, J.A. at 149A: "Since the 'new' provisions are simply 'technical amendments' admittedly aimed only at correcting the constitutional infirmity perceived by the Court of Appeals, then such amendments cannot be viewed as substantially altering the purpose of the Act in general."

economic protectionism, and unduly burdened interstate commerce, all in violation of the Commerce Clause.[5]

Connecticut answered and filed a motion for summary judgment asserting that the revised Connecticut statute was valid under *Healy I*. The only evidentiary material submitted with the summary judgment motion was a "Declaratory Ruling" by the Department of Liquor Control, in the form of an affidavit of defendant liquor commissioners John F. Healy and David L. Snyder. J.A. 29A-30A. The declaratory ruling interpreted the 1984 amendments to the price affirmation statute as requiring brewers to affirm that at the time of posting — on the sixth of the month — their posted prices in Connecticut were no higher than their lowest prices in any neighboring State. According to the ruling, it would not violate Connecticut law for a brewer subsequently to lower bordering-state prices below the previously affirmed Connecticut price. However, as appellants acknowledge, brewers cannot in fact subsequently lower bordering-state prices due to the interaction of the Connecticut affirmation law with the laws of the bordering States.

The brewers opposed Connecticut's summary judgment motion and filed a cross-motion for summary judgment. They argued that the Connecticut price affirmation statute, even as amended and as further altered by the Liquor Commission's declaratory ruling, violated the Commerce Clause on its face.[6]

The district court granted appellants' motion for summary judgment and denied appellees' cross-motion for summary judgment on the basis of *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). The Second Circuit, relying upon *Brown-Forman Distillers Corp. v. New York*

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[5] A fourth count of the complaint asserted that the Connecticut scheme violated the Supremacy Clause of the Constitution because it required conduct that, if engaged in solely by private parties, would violate section 1 of the Sherman Act. This count is not at issue on this appeal.

[6] The Wine & Spirit Wholesalers of Connecticut, Inc., a trade association of seven members who sell alcoholic beverages at wholesale in Connecticut, intervened as defendants and supported Connecticut's motion.

State Liquor Auth., 476 U.S. 573 (1986), unanimously reversed, holding that the Connecticut statute, even as amended, continued to control the prices at which brewers may sell beer in other States. After examining "the realities of beer price regulation in the border state area," *Healy II*, J.A. 196A, the court of appeals concluded that Connecticut's law "by its purposeful interaction with border-state regulatory schemes, operates to control prices beyond Connecticut's borders," *id.* at 201A. The court held that this extraterritorial impact violated the Commerce Clause.

The court of appeals distinguished *Seagram* on the ground that *Seagram* did not "endorse regulation which had the effect of controlling wholesaler beer prices in other states." *Id.* at 200A. Moreover, the court noted that the precedential value of *Seagram* had been undermined by this Court's statement in *Brown-Forman* that it did " 'not necessarily attach constitutional significance to the difference between a prospective statute,' such as the one it struck down, 'and the retrospective statute at issue in *Seagram*.' " *Id.* at 200A-201A (quoting *Brown-Forman*, 476 U.S. at 584 n.6).

SUMMARY OF ARGUMENT

In *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986), this Court held New York's price affirmation law unconstitutional on its face. The Court applied established Commerce Clause principles to conclude that state laws linking prices for in-state sales to those charged out of state may be found unconstitutional *per se* for either of two reasons. Such laws are invalid if: (i) their "practical effect" is "to control . . . prices in other States" or (ii) as "simple economic protectionism" they require "that producers or consumers in other States surrender whatever competitive advantages they may possess." " 476 U.S. at 580, 583. The Connecticut beer price affirmation law — which was adopted for the purpose of increasing beer sales by local vendors at the expense of out-of-state vendors, by tying the maximum permissible price for an item of beer in Connecticut

to the minimum prices at which a brewer offers the same item in any of the bordering States — is invalid under *both* the extraterritorial regulation and economic protectionism doctrines.

First, as the court of appeals correctly ruled, the Connecticut law has an impermissible extraterritorial effect because it regulates prices in other States. Connecticut's requirment that, at the time of posting, the posted Connecticut price must be no higher than the lowest price charged for the same item anywhere in the bordering States inevitably impinges on the brewers' freedom to set their prices in other States based solely on the competitive and marketing conditions therein. Moreover, because of the purposeful interaction of Connecticut's law with those in bordering States appellants' argument that the brewers are free to change their out-of-state prices before and after the time of the posting is patently erroneous. *Brown-Forman* made clear that the determinative issue is whether the *practical effect* of the law is to regulate commerce in other States. 476 U.S. at 583; *see also Healy I*, 692 F.2d at 275. Since the interaction of Connecticut's law with the laws and regulations in other States deprives the brewers of the freedom to change their out-of-state prices, it is clear that the amended law still has the impermissible practical effect that *Brown-Forman* and *Healy I* held to violate the Commerce Clause.

Connecticut cannot escape the consequence of the interaction of its affirmation law with the regulatory schemes of the bordering States by arguing that the fault lies with the other States. This Court has consistently recognized that the interaction of a statute with the regulations applicable in neighboring States constitutes an overall practical effect that must be examined in assessing the statute's constitutionality under the Commerce Clause. *See, e.g., Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 671 (1981). Moreover, it is only the Connecticut law that purposefully crosses state lines by referring to out-of-state prices as the benchmark for regulating beer prices for Connecticut.

Furthermore, although Connecticut claims that it has "done all that it can," Br. 9, to curb the extraterritorial impact of its laws by amending its statute, it is evident that any changes created by the amendments are merely cosmetic. If the amended law made a practical difference and actually allowed the brewers to change their bordering-state prices before or after the "moment" of affirming, the law would have no effect at all, and could not achieve the intended purpose of reducing the flow of Connecticut residents across state borders to buy beer at lower prices. Thus, as the court of appeals noted, the interaction of Connecticut's law with the laws in other States was "purposeful" and indeed central to achieving Connecticut's regulatory objective. J.A. 201A.

Second, the Connecticut law is protectionist. As appellants have conceded, and as the legislative history demonstrates, the law challenged herein was designed to halt the practice of Connecticut consumers living in border areas crossing state lines to purchase beer at lower prices. Even if the Connecticut statute only "equalized" beer prices on both sides of the state lines, this result still would have the tangible effect of depriving both vendors and consumers in the bordering States of the competitive advantages they would otherwise have relative to their Connecticut counterparts but for the Connecticut law. Under the Commerce Clause, a State may not seek to protect local interests by eliminating competitive advantages possessed by businesses or consumers in other States. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

Appellants have also erred in their reliance on *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), which upheld a retrospective price affirmation law. If, after *Brown-Forman*, anything is left of *Seagram* — a question this Court pointedly left open — what is left is plainly not enough to sustain the Connecticut law. This Court has consistently refused to extend *Seagram* to other types of affirmation statutes. *Brown-Forman*, 476 U.S. at 584 n.6; *Healy I*, 464 U.S. 909 (1983). The court of appeals was eminently correct

when it declined "to *extend* the *Seagram* precedent to validate [the] simultaneous affirmation provision" at issue here. J.A. 201A (emphasis in original). Moreover, unlike the Connecticut law, which was designed to favor in-state businesses, the law upheld in *Seagram* was enacted as a "drastic" requirement necessary to break "the grip of the liquor distillers on New York liquor prices." 384 U.S. at 48.

Furthermore, if this Court decides to reconsider *Seagram* in the context of the present case, *Seagram* should be overruled or substantially qualified. As Justice Blackmun observed in his concurring opinion in *Brown-Forman*, there is "no principled distinction . . . for constitutional analysis" between the retrospective affirmation law considered in *Seagram* and the prospective law struck down in *Brown-Forman*. 476 U.S. at 586. All price affirmation laws are protectionist and exercise impermissible extraterritorial control because they intrude considerations of the affirming State's market conditions into brewers' pricing decisions for other States, thereby neutralizing whatever advantages those States may possess.

Finally, the Twenty-first Amendment will not save protectionist or extraterritorial legislation. This Court has established that the Amendment provides no support for state laws that regulate prices in other States or constitute economic protectionism. *See Brown-Forman*, 476 U.S. at 584-85; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984); *Healy I*, 464 U.S. 909 (1983). If the Twenty-first Amendment immunized extraterritorial legislation like the Connecticut law, a State could "interfere with the ability of other States to exercise their own authority under the Twenty-first Amendment." *Brown-Forman*, 476 U.S. at 585. Moreover, as the Court emphasized in *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 276 (1984), "[t]he central purpose of the [Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition."

ARGUMENT

I. THE CONNECTICUT BEER PRICE AFFIRMATION LAW UNCONSTITUTIONALLY REGULATES COMMERCE IN OTHER STATES

The court of appeals correctly held that Connecticut's 1984 beer price affirmation law had the same practical effect as the prior version that was struck down in *Healy I* — the extraterritorial regulation of beer prices in the bordering States in violation of the Commerce Clause. Recognizing that the Connecticut law must be analyzed in light of the existing statutory and regulatory framework in the four-state region, the court held that the affirmation law "inevitably exercises control over 'the prices set for sales occurring wholly outside its territory.' " J.A. 196A (quoting *Healy I*, 692 F.2d at 282). Cosmetic changes in statutory language that alter neither the purpose nor the effects of the statute have not averted the law's continued conflict with basic Commerce Clause principles.

A. The Commerce Clause Prohibits Extraterritorial Regulation

It is well settled that the Commerce Clause prohibits extraterritorial regulation by any State of commerce in other States. *See, e.g., Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion); *Schwegmann Bros. Giant Super Mkts. v. Louisiana Milk Comm'n*, 416 U.S. 922 (1974) (per curiam); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 528 (1935). The Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Edgar v. MITE Corp.*, 457 U.S. at 642-43.

Whether a state law impermissibly regulates commerce occurring outside the State depends, as Connecticut recognizes, Br. 13, on whether "the 'practical effect' of the law is to control . . . prices in other States." *Brown-Forman*, 476 U.S. at 583. Under the Commerce Clause, "the critical consideration is the overall effect of the statute on both local

and interstate activity." *Id.* at 579. As the court of appeals observed, this Court has consistently recognized that "the interaction of the statute with the regulatory schemes of neighboring states constitutes an 'overall effect' which appropriately is considered." J.A. 197A. *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671 (1981) (plurality opinion); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 527-28 (1959); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 774-75 (1945).[7]

State laws violate the Commerce Clause when the enacting State has purposefully sought to interact with other States' regulatory schemes to achieve a purpose prohibited by the Commerce Clause. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. at 677 (striking down Iowa law restricting truck lengths when evidence showed that "Iowa seems to have hoped to limit the use of its highways by deflecting some through traffic" to States with laws permitting longer truck lengths). Moreover, it is not a constitutional justification of a state law that its extraterritorial reach is a function of the statutory schemes of the other States to which it may extend. *See, e.g., New Energy Co. v. Limbach*, 108 S. Ct. 1803, 1807-08, 1810 (1988) (declaring unconstitutional Ohio law denying generally available tax credit to sales of ethanol produced in other States unless those States' laws gave tax credit to sales of ethanol produced in Ohio); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 957-58 & n.18 (1982)

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[7] Connecticut fails in its attempts to distinguish the above-cited cases on the ground that they involve transportation and that the regulation of transportation necessarily requires greater interstate uniformity and admits of less local control than does the regulation of alcohol distribution. Conn. Br. 14. There is no special Commerce Clause doctrine peculiar to state regulation of transportation. It simply is a fact that, because of the nature of transportation, such regulation often has the *practical effect* of regulating commercial activity outside the State. The test is the *practical effect* of the statute whether it regulates beer or trucks. In this case there is as much regulation of out-of-state commercial activity by Connecticut as there was by any of the States that have tried to reach out to control the equipment on trucks or the length of trains.

(declaring unconstitutional Nebraska law prohibiting export of groundwater to other States unless those States' laws permitted export of their groundwater to Nebraska); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 378-80 (1976) (declaring unconstitutional Mississippi law excluding milk from other States unless those States' laws permitted entry of Mississippi milk).

This Court has twice held that affirmation statutes that have the practical effect of controlling liquor prices in other States are prohibited by the Commerce Clause. In *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986), the Court struck down a New York price affirmation statute that required distillers to post their wholesale liquor prices in New York on a monthly basis and to affirm that their wholesale prices in New York would be no higher than the lowest wholesale prices offered in any other State during the effective month. *Id.* at 575-76. The Court held that the New York statute effectively prevented distillers from lowering their prices in other States after posting and so imposed an impermissible extraterritorial restriction in violation of the Commerce Clause. The fact "[t]hat the ABC Law is addressed only to sales of liquor in New York is irrelevant if the 'practical effect' of the law is to control liquor prices in other States." *Id.* at 583. New York, the Court concluded, "has 'project[ed] its legislation' into other states, . . . directly regulated commerce therein," and deprived businesses and consumers in those States of "whatever competitive advantages they may possess." *Id.* at 580, 584.[8]

[8] The Court noted that the specific controversy that gave rise to the lawsuit involved (i) New York's refusal to permit distillers to offer promotional allowances that are permitted in other States and (ii) its defining "effective price" for purposes of price affirmation differently from other States. The Court observed that, as a result of the interaction of these laws, the New York law "can effectively force [the seller] to abandon its promotional allowance program in States in which that program is legal, or force those other States to alter their own regulatory schemes." 476 U.S. at 584.

In *Healy I* the court of appeals struck down Connecticut's original price affirmation statute, and this Court summarily affirmed the judgment. This statute, as we have seen, required brewers to post their Connecticut prices for the following month and file a sworn affirmation that these posted prices would be no higher than the lowest prices at which they would offer the same brands and packages of beer in any bordering State during the month covered by the posting. The court of appeals, in this Court's later paraphrase, concluded that "the Connecticut statute made it impossible for a brewer to lower its price in a bordering State in response to market conditions so long as it had a higher posted price in effect in Connecticut," and that, "[b]y so doing, the statute 'regulate[d] conduct occurring wholly outside the state,' 692 F.2d at 279, and thereby violated the Commerce Clause." *Brown-Forman*, 476 U.S. at 581-82.

Brown-Forman[9] and *Healy I* followed a long series of rulings by this Court establishing and confirming the proposition that States may not adopt laws that have the practical effect of regulating economic activity outside their borders. For example, in *Edgar v. MITE Corp.*, 457 U.S. at 642-43, in which the Court struck down an Illinois statute that regulated interstate corporate takeovers of non-Illinois corporations, Justice White noted that the Commerce Clause "precludes the

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[9] Following *Brown-Forman*, courts with only one exception have declared price affirmation statutes to be extraterritorial legislation in violation of the Commerce Clause. *See Brown-Forman Corp. v. Delaware Alcoholic Beverage Control Comm'n*, No. 87-20 LON (D. Del. Dec. 17, 1987) (declaring unconstitutional statute requiring price affirmation at time of sale); *Brown-Forman Corp. v. New Mexico Dep't of Alcoholic Beverage Control*, 672 F. Supp. 1383 (D.N.M. 1987); *Brown-Forman Corp. v. South Carolina Alcoholic Beverage Comm'n*, 643 F. Supp. 943 (D.S.C. 1986). The one exception, *Brown-Forman Corp. v. Tennessee Alcoholic Beverage Comm'n*, 860 F.2d 1354 (6th Cir. 1988), distinguished the court of appeals' decision in this case on the ground that the Connecticut statute inevitably controlled out-of-state prices: "there has been no claim that the Tennessee affirmation statute was designed to interact with the statutes of other states in such a way as inevitably to control prices beyond Tennessee's borders." *Id.* at 1361.

application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." In *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 775 (1945), this Court struck down an Arizona law limiting the length of railroad trains because the "practical effect of such regulation is to control train operations beyond the boundaries" of Arizona.

Similarly, in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), the Court invalidated a New York law that banned the sale in New York of milk purchased outside of that State if the purchase price was below a minimum established by New York. The Court held that one State "has no power to project its legislation into . . . [another State] by regulating the price to be paid in that state for milk acquired there," *id.* at 521, or by attempting "to neutralize economic advantages belonging to" another State, *id.* at 528. Nor may a State adopt a law that has the practical effect of establishing "a scale of prices for use in other states." *Id. See also Schwegmann Bros. Giant Super Mkts. v. Louisiana Milk Comm'n*, 416 U.S. 922 (1974) (per curiam), *aff'g* 365 F. Supp. 1144 (M.D. La. 1973), where the Court summarily affirmed a decision declaring unconstitutional a Louisiana statute which had the practical effect of regulating milk prices in other States by preventing milk purchased out-of-state from being sold in Louisiana when the purchase price was below a minimum set by Louisiana.[10]

These precedents clearly establish the unconstitutionality of Connecticut's affirmation law. The court of appeals correctly concluded that Connecticut's statute has the practical effect of regulating brewers' prices in the bordering States by tying the maximum permissible price for a brand and package

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[10] *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987), which the Wholesalers argue is a new departure in this Court's Commerce Clause jurisprudence, Br. 31-32, is entirely consistent with the precedents discussed above. In *CTS*, the Court upheld the validity of Indiana's takeover statute under the Commerce Clause precisely because it did not reach across state borders to regulate non-Indiana corporations. 481 U.S. at 93-94. By contrast, Connecticut's beer price affirmation law purposefully reaches across borders to control beer prices in neighboring States.

of beer in Connecticut to the minimum prices at which a brewer offers the same item anywhere in those other States. Moreover, it is obvious that controlling out-of-state prices is essential to Connecticut's acknowledged purpose for the law — "increasing the purchase of beer by Connecticut residents within the state and generating increased tax revenues for the state" by stopping the flow of "Connecticut residents [who] have crossed state borders in significant numbers to purchase beer in other states at lower retail prices." Conn. Br. 6-7. Thus, as the court of appeals held, the extraterritorial restrictions imposed by Connecticut's beer price affirmation statute were "purposeful." J.A. 201A.

B. Connecticut's Extraterritorial Control of Beer in Other States Violates the Commerce Clause

There is no dispute about how the Connecticut statute interacts with the regulatory schemes of the bordering States in a manner which controls the pricing decisions of brewers in those States. The court of appeals analyzed three aspects of this interaction. J.A. 197A-200A.

First, Massachusetts law requires brewers to post their prices on the first day of each month to become effective on the first day of the following month. Once posted, these prices cannot be changed. Mass. Gen. Laws Ann. ch. 138, § 25B (West 1974). Therefore a brewer cannot simply change its Massachusetts price for the "moment" Connecticut alleges it takes to post prices in Connecticut on the sixth day of that following month. As discussed above, Connecticut's revised price affirmation law requires brewers to affirm on the sixth day of each month that the prices they will charge for the entire following month will be at least as low as the lowest price they are charging in any bordering State at the time of affirming. Therefore, when a brewer posts his February prices in Massachusetts on January 1, he must consider the prices he will be compelled to charge in Connecticut throughout the month of March. The Massachusetts price cannot be changed on February 7 after the affirmation required by Connecticut's

law; it remains in effect for the entire month of February. As the court of appeals concluded, "[a] brewer can therefore undertake competitive pricing based on the market realities of Massachusetts or Connecticut but not both, because the Connecticut statute ties pricing to the regulatory schemes of the border states." J.A. 198A.

Second, New York law requires that a promotional discount must be maintained for at least 180 days before prices can be raised. *See* N.Y. Alco. Bev. Cont. Law § 55-b(2) (McKinney 1987). The court of appeals correctly found that the practical effect of the Connecticut law is to deter such discounts from being offered in New York markets because, if the discounted New York price is the lowest price in the three bordering States, it becomes automatically the regular price everywhere in Connecticut for the full 180 days plus an additional one month beyond the termination of the New York promotion, regardless of local competitive conditions in Connecticut. J.A. 199A.[11]

Third, volume discounts are permitted in Massachusetts, New York and Rhode Island, but are not allowed in Connecticut. The practical effect of Connecticut's price affirmation law is, therefore, to deter volume discounts anywhere in those States because, if volume discounts translated into the lowest per-container price in the neighboring States, the discounted price would have to be offered as the regular price for an entire month everywhere in Connecticut, where there is no reason to think that it would be warranted by costs or competitive conditions (especially as applied to non-volume sales). *Healy II*, J.A. 200A.

Plainly, the practical effect of Connecticut's price affirmation law is to exercise continuous extraterritorial control over brewers' future pricing decisions with respect to volume

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[11] Unlike Connecticut, which mandates a uniform state-wide price, New York law permits brewers to establish different prices based on conditions in different local markets. The Wholesalers' repeated unsupported assertions to the contrary, *see* Br. 35, 36; Jur. St. 20-21, are simply wrong. New York City wholesale prices are often the lowest in the four-state region. J.A. 151A.

discounts in Massachusetts, New York and Rhode Island, as well as brewers' future pricing decisions with respect to promotional discounts in New York. In the case of Massachusetts, Connecticut's law exercises an extraterritorial control over brewers' future pricing decisions with respect to all beer sales. Given the undisputed fact that different market conditions prevail in Connecticut and the bordering States, *see Healy II*, J.A. 192A; *Healy I*, 692 F.2d at 276 (noting that "[h]istorically the retail price of beer has been generally higher in Connecticut than in . . . Massachusetts, New York, and Rhode Island"), Connecticut's law must inevitably distort beer prices in those other States.[12]

The Connecticut price affirmation law prevents brewers from undertaking competitive pricing in the bordering States based solely on local market factors. When establishing their prices in the bordering States, the brewers are constrained by the prices they will be compelled to charge in Connecticut throughout the month following each affirmation. Connecticut therefore "has 'project[ed] its legislation' into other States, . . . directly regulated commerce therein," and deprived businesses and consumers in those States of "whatever competitive advantages they may possess" based on local market conditions, in contravention of established Commerce Clause principles. *Brown-Forman*, 476 U.S. at 580, 584.

Appellants argue that *Brown-Forman* and *Healy I* are distinguishable because in those cases the affirmation statutes at issue made price decreases in other States below the affirmed price illegal in the State of affirmation. By contrast,

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[12] *See* Pustay & Zardkoohi, *An Economic Analysis of Liquor Price Affirmation Laws: Do They Burden Interstate Commerce?*, 48 La. L. Rev. 649, 662 (1988), in which the authors conclude that:

> [P]rice affirmation regulations . . . lower price and raise consumption in the affirming state, but increase price and lower consumption in the nonaffirming state. The benefit to the consumers making lower priced purchases in the state having a price affirmation law not only causes losses to the distillers in both states, but also imposes additional costs on consumers in the nonaffirming state. That is precisely the phenomenon which is proscribed by the commerce clause.

appellants argue, the revised Connecticut price affirmation statute does not make price decreases in other States illegal. Conn. Br. 11-12; Wholesalers Br. 24-26. This argument misses the point because it ignores the plain language of *Brown-Forman*, *Healy I* and the other precedents discussed above. The Connecticut affirmation law violates the Commerce Clause "if the 'practical effect' of the law is to control liquor prices in other States." *Brown-Forman*, 476 U.S. at 583. Whether Connecticut's law achieves this effect by expressly declaring price decreases in the bordering States illegal (as the law did before it was revised), or by purposefully interacting with the bordering States' beer regulations to control price decreases in those States (as it does now), is irrelevant. It is the Connecticut statute's practical effect of extraterritorial control which is forbidden by the Commerce Clause.

Nevertheless, Connecticut contends that "[s]uch matters are clearly outside of [its] control." Conn. Br. 9, 13. It asserts that it "has done all it can to avoid the extraterritorial effects of its law." *Id.* at 9. The fault, according to Connecticut, lies with the laws of the bordering States. Connecticut also relies upon its belief that "administrative exemptions are available in both [New York and Massachusetts]." *Id.* at 13 n.5. This reasoning is specious.

A State law's violation of the Commerce Clause may not be justified by reference to the statutory schemes of other States. *See, e.g., New Energy Co. v. Limbach*, 108 S. Ct. at 1807-08, 1810; *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. at 957-58 & n.18; *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. at 378-80. Significantly, it is only the Connecticut law — not the laws of any of the bordering States — which purposefully crosses state lines by making out-of-state prices the basis for regulating beer prices in Connecticut. If Connecticut did not persist in tying maximum in-state beer prices to the lowest beer prices in neighboring States, the price regulations in its neighboring States would not contribute to the undisputed extraterritorial effects. The source of these effects is clearly the Connecticut affirmation law, and Connecticut may not force the bordering States to change their

laws in order to eliminate the impermissible effects. *See Brown-Forman*, 476 U.S. at 584 (holding that New York may not through its affirmation law "force . . . other States to alter their own regulatory schemes").

Moreover, Connecticut is surely being disingenuous when it argues that it has done all it can to stop regulating beer prices in the bordering States by amending its statute. The 1984 amendments made a mere cosmetic change in the Connecticut law, which — even after the liquor commissioner's rewriting of the 1981 provision that the legislature had left unchanged — maintained the practical extraterritorial effects of the original law resulting from its interaction with bordering States' beer regulations. Connecticut has acknowledged that the purpose of its affirmation law is to stop its residents from crossing state lines "to purchase beer in other states at lower retail prices" by attempting to eliminate the lower retail prices prevailing in the border States. Conn. Br. 6-7, 10, 18. If the brewers were really free to change their prices in the bordering States after affirming in Connecticut — which they are not because of the interaction discussed above — Connecticut's beer price affirmation law would not and, indeed, could not have the effect intended by the State.

In apparent recognition of this fallacy in its argument, Connecticut argues that the brewers are free to seek regulatory exemptions from New York and Massachusetts to permit them to lower prices after the sixth of any month. Br. 13 n.5. But New York and Massachusstts are under no compulsion to grant the requests; there is nothing unconstitutional in their regulations. If, because of the concern about the consequences of the Connecticut provisions, New York and Massachusetts did grant across-the-board exemptions, thereby emasculating their own beer regulatory schemes, that would be proof of the extraterritorial effect of the Connecticut law, not mitigation of it. *See Brown-Forman*, 476 U.S. at 585. It is bizarre to suggest reliance on the grace of New York and Massachusetts authorities as the salvation of an unconstitutional Connecticut law. Even if Connecticut were offering some waiver machinery of its own — which it has not done —

"[t]he protections afforded by the Commerce Clause cannot be made to depend on the good grace of a state agency." *Id.* at 582 n.5.[13]

This Court should reject Connecticut's suggestion that it must close its eyes to the realities of the context in which the affirmation scheme was enacted and operates. The plain fact is that Connecticut's present price affirmation law has the same practical effects of severely restricting brewers' pricing flexibility in the bordering States that caused this Court to invalidate the State's prior price affirmation law. The law, therefore, impermissibly regulates extraterritorial conduct in violation of the Commerce Clause.

II. CONNECTICUT'S BEER PRICE AFFIRMATION LAW VIOLATES THE COMMERCE CLAUSE BECAUSE IT IS PROTECTIONIST

The decisions of this Court have firmly established that state legislation constituting economic protectionism is invalid under the Commerce Clause. Connecticut's beer price affirmation statute constitutes such protectionism and accordingly should be declared unconstitutional. Appellants' arguments that Connecticut is merely trying to "equalize" prices on both sides of its borders and generate additional tax revenues are irrelevant.

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[13] Connecticut also argues that its affirmation law is constitutional because businesses that operate in a pervasively regulated industry in more than one State are often subject to inconsistent regulations "and any such business must simply be prepared to conform its various local operations to more than one set of laws." Br. 14. To support this assertion, Connecticut cites a number of cases that interpreted the Contract Clause, had nothing to do with extraterritorial legislation, and expressly stated that they did not involve the Commerce Clause. *See Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413 n.17 (1983); *Beer Co. v. Massachusetts*, 97 U.S 25, 33-34 (1877). These cases do not support the assertion that a brewer may lawfully be compelled to conform its local operations in one State to the laws of another State because of the purposeful extraterritorial effect of that State's beer regulations. Practical extraterritorial control over local operations in another State is precisely what this Court condemned in *Brown-Forman*. 476 U.S. at 583-84.

A. The Constitution Prohibits Legislation That Benefits Local Residents at the Expense of Out-of-State Residents

As this Court recently reiterated in *Brown-Forman*, when a state statute "discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." 476 U.S. at 579.[14] In such circumstances, "a virtually *per se* rule of invalidity has been erected." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). *See also Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36-37 (1980); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 531-39 (1949); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935). "[T]he Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition." *Lewis*, 447 U.S. at 44. *Accord Hood*, 336 U.S. at 538 (noting "the incapacity of the state to protect its own inhabitants from competition").

Attempts by States to protect themselves from outside competition, even if such attempts are only intended to achieve price equality, constitute "economic protectionism" and are *per se* illegal under the Commerce Clause. *See, e.g., Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 351-52 (1977). As this Court held in *Brown-Forman*, a State "may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess." 476 U.S. at 580. *See also New Energy Co. v. Limbach*, 108 S. Ct. 1803, 1807-08 (1988); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970); *Toomer v. Witsell*, 334 U.S. 385, 403-06 (1948).

In the leading Supreme Court case on economic protectionism, *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), on which the Court heavily relied in *Brown-Forman*, New

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[14] Protectionism, of course, is not limited to efforts to benefit local businesses at the expense of their out-of-state counterparts; it also includes efforts to benefit local consumers. *See Brown-Forman*, 476 U.S. at 580; *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982).

York required that milk distributors pay a minimum price for all milk that they intended to sell in New York, including milk purchased out-of-state. Because Vermont dairy farmers produced milk at lower cost than New York dairy farmers, the effect of the statute was to eliminate the competitive economic advantage enjoyed by Vermont dairy farmers by equalizing the price of milk from all sources.

The Court held that the minimum price floor for milk amounted to impermissible economic protectionism:

> If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.

Id. at 522. In effect, New York had imposed an import tariff on all milk brought into the State. *Id.* at 521. Such a tariff, the Court concluded, violated the Commerce Clause. *Id.* at 522. *See also Schwegmann Bros. Giant Super Markets v. Louisiana Milk Comm'n*, 365 F. Supp. 1144, 1154 (M.D. La. 1973) (a State may not, to protect its inhabitants, "neutralize an economic advantage possessed by a neighboring state by imposing its minimum price standards on the products purchased in that neighboring state"), *aff'd*, 416 U.S. 922 (1974).

In *Seelig*, there was no avowed intent to hurt or discriminate against out-of-state businesses, merely a desire to benefit economically local businesses — the equivalent of what the district court in *Healy I* called "cushioning the impact of free competition on the small retail stores." 532 F. Supp. at 1318 n.16 (D. Conn. 1982). Moreover, as in this case, the statute involved in *Seelig* merely required "equal" prices for out-of-state products. Yet, that statute, like the Connecticut price affirmation provisions, by stripping out-of-state producers of their competitively set lower prices for the purpose of economically benefiting in-state businesses and residents, "set a barrier to traffic between one state and another" and therefore violated the Commerce Clause. *Seelig*, 294 U.S. at

521. *See also Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 351 (1977), holding that a State discriminates against interstate commerce when a "statute has the effect of stripping away" from out-of-state businesses "the competitive and economic advantages" they have earned for themselves, or when the statute has a "leveling effect which insidiously operates to the advantage of local" businesses.[15]

B. The Connecticut Affirmation Provisions are Protectionist

The Connecticut affirmation provisions constitute a paradigm case of an explicitly protectionist statute. By its very terms, the law strips New York, Massachusetts and Rhode Island retailers, wholesalers, consumers and brewers of all competitive advantages that they previously enjoyed. Such legislation, at the very least, "invokes the strictest scrutiny." *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979); *New Energy Co. v. Limbach*, 108 S. Ct. at 1810. No more than a brief examination is required to confirm the protectionist nature of the Connecticut statute.

Equalizing prices at the wholesale level between Connecticut and its neighbors destroys the competitive advantage of businesses in neighboring States relative to Connecticut businesses. *See Brown-Forman*, 476 U.S. at 580; *Seelig*, 294 U.S. at 522. Retailers and wholesalers in neighboring States will lose business from Connecticut customers regardless of whether the prices they pay are increased to the level of their

[15] Indeed, in one respect this case represents a far more drastic interference with interstate commerce than the pricing requirement in *Seelig*. In *Seelig*, New York sought only to strip out-of-state milk producers of their lower prices when they sold to New York distributors. The Connecticut statute not only strips out-of-state beer retailers of their competitive advantage of lower prices when they sell to Connecticut residents but also will inevitably raise beer prices for the residents of New York, Massachusetts and Rhode Island who purchase beer for consumption in their home State. *See* Pustay & Zardkoohi, *An Economic Analysis of Liquor Price Affirmation Laws: Do They Burden Interstate Commerce?*, 48 La. L. Rev. 649 (1988).

Connecticut competitors or the Connecticut competitors' prices are reduced to their levels. *Cf. Healy I*, 532 F. Supp. at 1317. The incentive to purchase beer out-of-state is eliminated and the widespread shopping of Connecticut residents for beer in the neighboring States will cease. Similarly, the comparative advantage of consumers in bordering States relative to consumers in Connecticut is also eliminated. *See Brown-Forman*, 476 U.S. at 580. Moreover, bordering-state wholesalers, retailers and consumers will lose the advantage of the prices created by economic conditions. *See Seelig*, 294 U.S. at 524. The impact of the Connecticut statute is identical to that of a tariff.

The legislative debates concerning the adoption of the Connecticut price affirmation statute confirm that the purpose of the legislators supporting the law was to protect Connecticut businesses from out-of-state competition. The Connecticut legislature enacted beer price affirmation in response to the widespread discontent of retailers with out-of-state competition. The legislature believed that beer was cheaper in the neighboring States of New York, Massachusetts and Rhode Island because of Connecticut's minimum price regulations, and that many people traveled to those States to buy the cheaper beer. The legislature responded to the discontent in part by repealing the minimum markup for beer. 1981 Conn. Pub. Acts No. 81-294, § 21 (Reg. Sess.) (effective date Jan. 1, 1982).

The Connecticut legislature, however, went on to impose beer price affirmation in order to protect its local businessmen from the robust competition occurring outside its borders. The protectionist purpose of the legislation was stated clearly by Senator Schneller, a proponent of the legislation:

> What we're saying is Mr. Beer distributor or Mr. Beer brewer, you're going to have to send your beer into the State of Connecticut at the price that is the lowest price at which you sell to any distributor in Rhode Island, Massachusetts or New York. *We are not taking off minimum markup and making a totally competitive free enterprise*

> *situation. I think we're doing it in a way that provides a measure of protection to the individuals that the State of Connecticut had made a contract with.*

Conn. General Assembly Proceedings 1981: Senate 45-46 (emphasis added).[16] Similar sentiments were expressed by other proponents of the bill, both in the Senate and in the House of Representatives. *See id.* at 23 (remarks of Senator Mustone) (describing losses of revenue to local retail businesses of between $40 million and $50 million per year); *id.* at 58 (remarks of Senator O'Leary) ("liquor store owners in my district are starving to death slowly as result of business fleeing to Massachusetts"); *Conn. General Assembly Proceedings 1981: House of Representatives* 118 (remarks of Representative Schlesinger) (opposing amendment to eliminate price affirmation because amendment not in spirit of "discourag[ing] out of state purchases").

Indeed, the district court in *Healy I* found as an undisputed fact that the purpose of the legislation was to increase beer purchases within Connecticut, with the increases resulting from the shifting of purchases previously made outside of Connecticut to retailers located in Connecticut. 532 F. Supp. at 1316-17; *see also Healy I*, 692 F.2d at 276.

The legislative purpose behind the subsequent amendments to the price affirmation statute, although purportedly an attempt to comply with *Healy I*, remained the same — the protection of local beer retailers and wholesalers from out-of-state competition.[17] Representative Moynihan succinctly stated the legislature's view of the purpose behind beer price affirmation:

> We decided to open up competition among our retailers and among our wholesalers so they were no longer protected by minimum markup. What we are concerned

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[16] Excerpts from the legislative debates are reproduced in the Joint Appendix, J.A. 45A-85A. The entire debates are contained in the Record on Appeal filed in the court of appeals in connection with *Healy II*. Citations are to the Joint Appendix whenever cited material is included therein.

[17] *See supra* p. 7 n.4.

> [sic] is the leverage of the State stores had [sic] in purchasing and the border states, the very large states, and the enormous size of the wholesalers and retailers, that our wholesalers and retailers would be at a disadvantage because so many of our customers had gotten in the habit of going across the border.

J.A. 57A. Representative Zajac, another proponent of the 1984 amendments, confirmed the legislature's protectionist purpose when he stated that "affirmation, in fact, is working" because fewer Connecticut residents were purchasing their beer in the neighboring States. J.A. 66A.

It is thus apparent that the Connecticut legislature intended to achieve the very protectionist goals which are inherent in the statutory provisions and are the inevitable effect of the statute's operation.

Appellants argue, however, that somehow this elimination of competition does not amount to protectionism. They claim it is significant that Connecticut is merely seeking "equal prices" for its wholesalers, not lower prices. But this is frivolous. Requiring price equality is as protectionist as requiring a price advantage.

In *Brown-Forman*, New York sought only "equality" in liquor pricing rather than a price advantage for its wholesalers *vis à vis* wholesalers in other States. In *Seelig*, New York did not require that Vermont milk producers charge more for their milk than New York producers but sought only to equalize the prices paid for milk purchased by New York distributors in Vermont and New York. Similarly, in *Hunt* the North Carolina authorities sought only to place all apple producers, both in-state and out-of-state, on an "equal" footing with respect to apple sales within the State. Nevertheless, the Supreme Court in all these cases invalidated the state legislation as *per se* unconstitutional. *See also Limbach*, 108 S. Ct. at 1805 (State may not condition tax created for sale of out-of-state ethanol upon reciprocity); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976) (State may not condition sale of out-of-state milk upon reciprocity).

The Commerce Clause was adopted to foster the unfettered competition of products and prices in interstate commerce. Connecticut's attempt to impose price uniformity on interstate commerce is as obnoxious to the Commerce Clause as an attempt to gain an economic advantage over out-of-state residents.

Moreover, the Connecticut price affirmation statute does not merely equalize prices among competing businesses along state borders. The Connecticut statute ties Connecticut prices to the lowest prices anywhere in any neighboring State, not merely in the areas bordering the particular Connecticut market. For example, if prices for a brand in New York City were lower than prices in any of the other States adjoining Connecticut,[18] wholesalers in areas of Connecticut that border Massachusetts would nevertheless receive beer at prices equal to New York City prices. These prices could be substantially lower than competitive prices in Massachusetts (or even areas of New York State) near the Connecticut border.

Appellants attempt to divert attention from these basic principles by claiming that Connecticut has a right to prevent brewers from discriminating against Connecticut wholesalers by charging them higher prices than border-state wholesalers.[19] It is readily apparent, however, that what appellants are complaining about is only that individual brewers charge whatever prices they believe will maximize their profits in particular markets. The Commerce Clause simply does not permit Connecticut to deprive brewers of this right beyond its borders. Appellants apparently envision a regime in which the States are free to compel brewers to charge uniform prices

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[18] *See* J.A. 151A.

[19] Appellants, of course, ignore the fact, which they have conceded, that "prices charged by brewers and importers to Connecticut wholesalers are neither the highest nor the lowest in the four-state area." J.A. 152A. Moreover, as the district court noted in *Healy I*, it is Connecticut's "extensive regulations" that result in "maintaining higher prices and otherwise restricting price competition" in that State. 532 F. Supp. at 1318 n.16.

throughout the nation, thereby depriving out-of-state residents of the advantages of lower prices. This is precisely what the Commerce Clause prohibits. *See, e.g., Limbach*, 108 S. Ct. at 1807-08; *Brown-Forman*, 476 U.S. at 580; *Hunt*, 432 U.S. at 351-52.

Appellants urge alternatively that Connecticut's attempt to deter Connecticut residents from purchasing beer out-of-state should be sustained because the legislature's ultimate purpose was to increase tax revenues by increasing the purchase of beer by Connecticut residents within the State. The statutory provisions and legislative debates, discussed above, reveal that the legislative purpose was not to increase tax revenues but to benefit Connecticut wholesalers and retailers at the expense of out-of-state brewers, wholesalers and retailers.[20] It is unnecessary, however, to resolve the dispute about "*ultimate* legislative purpose," because "its resolution would not be relevant to the constitutional issue to be decided in this case." *City of Philadelphia v. New Jersey*, 437 U.S. at 626 (emphasis added). This Court has emphasized that "[t]he evil of protectionism can reside in legislative means as well as legislative ends." *Id.* A State may not pursue legitimate health, safety or economic goals by requiring out-of-state producers or consumers to surrender economic advantages they possess. *See Brown-Forman*, 476 U.S. at 580; *Bacchus*, 468 U.S. at 270-73; *Hood*, 336 U.S. at 538; *Seelig*, 294 U.S. at 523. As the Court held in *Toomer v. Witsell*, 334 U.S. at 406, "the importance of having commerce between the . . . States flow unimpeded by local barriers persuades us that State restrictions inimical to the commerce clause should not be approved simply because they facilitate in some measure enforcement of a valid tax."

Connecticut's reliance upon its interest in increasing tax revenues is particularly specious. Acceptance of this proposition would eviscerate the protections of the Commerce

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[20] It is readily apparent that increasing tax revenues "is merely an occasional and accidental effect of achieving what is its purpose, favorable . . . treatment for" Connecticut wholesalers and retailers at the expense of their out-of-state counterparts. *Limbach*, 108 S. Ct. at 1806.

Clause. Virtually any state regulation designed to increase in-state sales at the expense of out-of-state sales in order to benefit local merchants will, if it succeeds in increasing in-state sales, also increase tax revenues. Thus, a State could almost always characterize protectionist legislation as a means of increasing tax revenue. In any event, Connecticut's alleged interest in increasing tax revenues may not be achieved by the "illegitimate means of isolating the State from the national economy." *City of Philadelphia v. New Jersey*, 437 U.S. at 627.

Finally, Connecticut conjectures, without any support in the record whatsoever, that the affirmation provisions may prevent violations of limitations upon importation imposed by Connecticut law. Br. 10, 19, 23 & n.11. Nowhere does Connecticut explain why it believes Connecticut residents who purchase beer from bordering-state retailers are violating these limitations. Moreover, the statute Connecticut cites, Conn. Gen. Stat. § 12-436 (West Supp. 1988), states that "[t]he provisions of this section shall not apply to alcoholic beverages which are actually brought into the state by any individual in quantities of four gallons or less." In view of this exception, Connecticut's speculation that its beer price affirmation law is intended to prevent evasion of import limitations by consumers is implausible. In any event, even if greater enforcement of importation restrictions is desirable, it may not be achieved through means designed to deprive bordering-state consumers, retailers and wholesalers of whatever competitive advantages they enjoy. The Wholesalers engage in additional speculation that the Connecticut statute may promote highway safety. Br. 34. There is no claim in this case, however, that Connecticut border residents regularly cross state lines to consume beer as opposed to buying it at retail establishments for home consumption. Similarly, there is no claim that Connecticut border residents would drive any

less frequently to purchase beer in Connecticut rather than in the border areas of neighboring States.[21]

It is Connecticut's burden, where, as here, the legislation discriminates against interstate commerce, to show at least that the affirmation scheme serves a legitimate local purpose that could not be served as well by non-discriminatory means. *Limbach, supra; Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (plurality opinion). The various rationales proffered by appellants are wholly inadequate.[22]

III. APPELLANTS' RELIANCE UPON *SEAGRAM* IS ERRONEOUS

Appellants claim that Connecticut's extraterritorial and protectionist legislation is somehow saved by this Court's decision in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). If, after *Brown-Forman*, anything is left of

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[21] Significantly, a review of the relevant legislative debates reveals that not one legislator mentioned enforcement of importation restrictions or highway safety as reasons for enacting affirmation legislation. *See* J.A. 45A-85A (containing excerpts from legislative debates); Record on Appeal.

[22] Connecticut also argues, Br. 19 & n.10, that the brewers do not have standing to challenge the beer price affirmation laws as protectionist. To have standing, a plaintiff need show "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Baker v. Carr*, 369 U.S. 186, 204 (1962). *Accord Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978). Thus, the plaintiff must show a " 'distinct and palpable injury' " to himself and "a 'fairly traceable' causal connection between the claimed injury and the challenged conduct." *Duke Power*, 438 U.S. at 72 (citations omitted). As the district court found, the beer price affirmation provisions regulate the brewers' pricing decisions and restrict to some degree their pricing flexibility. J.A. 183A-184A. Thus, there is sufficient injury and causal connection to give the brewers standing to challenge the law. Moreover, as long as the brewers are injured themselves, they are "entitled to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should [their] constitutional challenge fail and the statutes remain in force." *Craig v. Boren*, 429 U.S. 190, 195 (1976). Consequently, the brewers may also assert the burdens imposed by the price affirmation provision on wholesalers, retailers and consumers in the bordering States.

Seagram— a question this Court pointedly left open — what is left is plainly not enough to sustain the Connecticut beer price affirmation law. Unlike the old New York liquor price affirmation statute upheld in *Seagram*, the Connecticut statute is not "retrospective" in nature. Connecticut's revised affirmation law is "contemporaneous" or "simultaneous," not retrospective, because it ties Connecticut prices to the lowest prices being offered in a bordering State at the time of affirmation. *See Healy II*, J.A. 195A, 201A. Therefore, like the new New York statute at issue in *Brown-Forman*, Connecticut's law is not validated by *Seagram*. *See Brown-Forman*, 476 U.S. at 584 n.6. This Court has consistently declined to extend *Seagram* to uphold other types of affirmation statutes. Connecticut's original beer price affirmation law fell in *Healy I* and New York's new liquor price law fell in *Brown-Forman* in spite of *Seagram*. The Court should also decline to extend *Seagram* in this case.

Furthermore, *Seagram* was decided in a unique context in which no affirmation statute had yet been put into effect. 384 U.S. at 42-43. At that time, "affirmation statutes were comparatively new," *Brown-Forman*, 476 U.S. at 586 (Blackmun, J., concurring), and their practical effects could not be foreseen. The Court noted in *Seagram* that "it is possible that specific future applications of [the retrospective statute] may engender concrete problems of constitutional dimension," which it would deal with as they arose. 384 U.S. at 52. Here, as demonstrated above, the practical effects of the Connecticut statute's interaction with the beer regulations of Massachusetts, New York and Rhode Island are clear and indistinguishable from the practical effects of the statutes struck down in *Brown-Forman* and *Healy I*.

Moreover, the liquor price affirmation statute before the *Seagram* Court was passed by New York in order to break the monopolistic and discriminatory grip of liquor distillers on the New York market, not to gain an economic advantage for New York residents. Indeed, the Court noted that "only by imposing the relatively drastic 'no higher than the lowest price' requirement . . . could the grip of the liquor distillers on

New York liquor prices be loosened." 384 U.S. at 48. Significantly, no claim of economic protectionism was even asserted in *Seagram* by the plaintiff.

The Connecticut statute, in contrast, seeks only to promote in-state sales at the expense of out-of-state sellers and consumers. There is no basis for asserting that Connecticut consumers, retailers or wholesalers are the victims of illegal or anti-competitive conduct.[23] Thus appellants err in construing *Seagram* — particularly in view of intervening Supreme Court decisions culminating in *Brown-Forman* — as giving permission to States to enact protectionist or extraterritorial legislation. The court of appeals correctly concluded that it would

> decline to *extend* the *Seagram* precedent to validate a simultaneous affirmation provision that, by its purposeful interaction with border-state regulatory schemes, operates to control prices beyond Connecticut's borders.

J.A. 201A (emphasis in original).

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[23] Appellants seem to claim that prices are higher in Connecticut than in New York border areas because of the highly regulated and anti-competitive nature of the New York liquor industry. Conn. Br. 19-20, Wholesalers Br. 32-34. This is both irrelevant and erroneous. Appellants have pointed to no New York statute or regulation relating to the sale of beer that in any way reaches beyond New York's borders. Moreover, as appellants have conceded, "the brewers' pricing policies in New York and Rhode Island are characterized by a good deal of flexibility and variability. The New York City market is the most highly competitive, and accordingly, prices are often the lowest in the four-state region." J.A. 151A. The claim by the Wholesalers that New York prices near the border are lower because such areas by operation of New York law receive the benefit of low New York City prices is also erroneous. Unlike Connecticut, New York does not require brewers to charge uniform prices throughout the State and permits brewers to charge different prices in different regions. Indeed, it is the Connecticut scheme that will result in discrimination at the border since the Connecticut border wholesalers and retailers will receive the lowest prices available anywhere in New York even though the wholesalers and retailers just across the Connecticut border in New York may be receiving higher prices.

If this Court determines to reach the question of the continuing validity of *Seagram* in the context of this case, it should be overruled or substantially qualified. Its precedential value has been significantly undermined by *Brown-Forman*, which in discussing *Seagram's* inapplicability to the New York affirmation law before it, noted that

> we do not necessarily attach constitutional significance to the difference between a prospective statute and the retrospective statute at issue in *Seagram*. Indeed, one could argue that the effects of the statute in *Seagram* do not differ markedly from the effects of the statute at issue in the present case.

476 U.S. at 584 n.6. Justice Blackmun, concurring, urged that *Seagram* be formally overruled as "a relic of the past" and concluded that "no principled distinction" could be drawn "for constitutional analysis between New York's current prospective statute and the same State's retroactive statute upheld in *Seagram*." 476 U.S. at 586. Like all affirmation laws, a retrospective statute — which ties maximum future prices in one State to the lowest prices in other States as determined at a specified time in the past — will control brewers' future pricing decisions in the nonaffirming States. Brewers will not forget that the lowest prices which they set in the nonaffirming States will one day become the maximum permissible prices in the States requiring affirmation.[24]

Formalistic distinctions among types of affirmation laws obscure a basic truth: All price affirmation laws are protectionist and exercise impermissible extraterritorial control by

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[24] *See Brown-Forman Corp. v. New Mexico Dep't of Alcoholic Beverage Control*, 672 F. Supp. 1383, 1386 (D.N.M. 1987):

> Whether the extraterritorial effect of price affirmation legislation is directed to the past, to the future or to the instant of posting prices is of no constitutional consequence. "It is not the timing of the extraterritorial effect but the fact that it takes place which the Supreme Court has declared invalid."

(Citation omitted). *See also* Note, *Liquor Price Affirmation Statutes and the Dormant Commerce Clause*, 86 Mich. L. Rev. 186, 188 (1987) (concluding "that *all* liquor price affirmation statutes violate the commerce clause") (emphasis in original).

intruding considerations of the affirming State's market conditions into brewers' pricing decisions for other States. Legislation that requires manufacturers or retailers to offer their products for sale at prices no higher than the prices offered in other States inevitably regulates pricing decisions in other States and deprives out-of-state consumers of the relative advantage they would enjoy in the absence of such legislation. A State is normally free to fix the maximum price at which beer may be sold within its borders. It may not do this, however, in a manner that inevitably imposes burdens upon consumers in other States in order to achieve lower prices within its borders. *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981). This is precisely what affirmation statutes do.[25]

In determining whether a statute violates the Commerce Clause, "[t]he principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. at 37. Under affirmation, a brewer is no longer free to set prices in out-of-state markets in a manner that will maximize profits in those markets based upon prevailing market conditions. It must consider that the lowest prices it charges in those markets must be offered throughout the affirmation State. If an affirmation State's prices are higher than those offered in out-of-state markets in the absence of affirmation, a brewer's interest in profit maximization will inevitably result in his raising his out-of-state prices and lowering his affirmation-state prices to some extent in order to satisfy the requirements of affirmation. This is the very evil condemned by this Court in *Seelig*. "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." 294 U.S. at 521. Affirmation statutes inevitably deprive other States of economic advantages created by market forces in order to obtain lower prices for in-state consumers. This is

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[25] *See* Pustay & Zardkoohi, *An Economic Analysis of Liquor Price Affirmation Laws*, 48 La. L. Rev. at 662, 667, 669, 672, 673-74.

precisely the protectionist effect that was condemned in *Seelig* and *Hunt*.

Recent economic scholarship confirms that

> both [prospective and retrospective] types of price affirmation burden interstate commerce because they both cause firms to consider jointly their demand and marginal cost curves in more than one state. Accordingly, the impact of an affirmation law adopted by one state will be transmitted to other states, affecting prices charged in those other states in the process. This impact on interstate commerce is inherent in any law that ties prices in one state to prices in other states.[26]

Moreover, if the constitutionality of beer affirmation statutes is sustained, other States would no doubt retaliate or seek similar benefits by enacting similar statutes.[27] *See City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945). The result would be uniform national beer prices imposed by the States. But this is the type of interference with and control of the nationwide economic free market which the Commerce Clause precludes the States from undertaking and preserves for the consideration of Congress. *Cf.* Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1187-91 (1986).[28]

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[26] Pustay & Zardkoohi, *An Economic Analysis of Liquor Price Affirmation Laws*, 48 La. L. Rev. at 673-74. As the authors explain, "both types of affirmation cause prices to be lower in the affirming states and higher in those nonaffirming states used in the joint determination process than prices would be in the absence of affirmation. As such, both types of affirmation burden interstate commerce." *Id.* at 672.

[27] Indeed, the proliferation of such statutes has already considerably restricted pricing flexibility in the liquor industry. *See Brown-Forman*, 476 U.S. at 586 (Blackmun, J., concurring).

[28] Connecticut argues that it should be allowed to discriminate through its affirmation law because "control states" acting as market participants are able to require price-affirmation clauses in their contracts to purchase liquor. Conn. Br. 24. Connecticut's argument turns the market participant doctrine on its head by eliminating the distinction between "a State's acting

Finally, the rationale of *Seagram*, which relied principally upon the Twenty-first Amendment, has been substantially eroded by developments in this Court's Twenty-first Amendment jurisprudence, *see* Point IV *infra*, which establish that the Amendment does not authorize States to enact protectionist or extraterritorial legislation that would otherwise violate the Commerce Clause.

IV. THE TWENTY-FIRST AMENDMENT DOES NOT PROTECT EXTRATERRITORIAL OR PROTECTIONIST LEGISLATION

Appellants repeat the same proposition already rejected by this Court in *Brown-Forman*, 476 U.S. at 584-85, and *Healy I*, that an extraterritorial price affirmation statute is somehow excused by the Twenty-first Amendment. As the court of appeals correctly held, this Amendment reserves to the States the power to regulate the " '*transportation* or *importation*' of liquor '*into*' any [s]tate . . . for delivery or use *therein*,' " but does not give any State the power to control the price of liquor in other States. J.A. 202A (emphasis in original). This Court has consistently rejected the argument "that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964). Instead, both the Commerce Clause and the Twenty-first Amendment are parts of the same Constitution, *id.* at 332, and they must be reconciled in any particular case according to the different purposes they serve and different interests they protect. *See 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346-52 (1987);

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in its distinctive governmental capacity, and a State's acting in the more general capacity of a market participant." *New Energy Co. v. Limbach*, 108 S. Ct. at 1809. Connecticut is not a market participant in this case because its sovereign act of enacting the beer price affirmation law "cannot plausibly be analogized to the activity of a private purchaser." *Id.* Therefore, Connecticut's beer price affirmation law is subject to the requirements of the Commerce Clause and cannot be validated by the actions of control States.

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 109-14 (1980).

If Connecticut were correct that the Twenty-first Amendment protects its extraterritorial price affirmation law from challenge under the Commerce Clause, then Connecticut's exercise of its rights under this Amendment "may interfere with the ability of other States to exercise their own authority under the Twenty-first Amendment" by "forc[ing] other States either to abandon regulatory goals or to deprive their citizens of the opportunity to purchase brands of liquor that are sold in" Connecticut. *Brown-Forman*, 476 U.S. at 585. Such interference could serve only to invite retaliatory legislation from other States — one of the evils which the Commerce Clause was intended to prevent. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984).

Moreover, the Twenty-first Amendment does not immunize protectionist legislation from invalidation under the Commerce Clause. Thus, in *Bacchus* the Court rejected the contention that the Twenty-first Amendment authorized a state tax that discriminated against out-of-state alcoholic beverages in violation of the Commerce Clause:

> One thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition. . . . State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.

Id. Because the only justification for the discriminatory tax was to promote local industry, *Bacchus* rejected the State's Twenty-first Amendment argument. Here, as in *Bacchus*, Connecticut has not attempted to justify its legislation on the basis of a purpose to reduce beer consumption or combat any perceived evil attending the consumption of beer. Instead, the Connecticut affirmation statute, as appellants proclaim, is designed to increase Connecticut beer sales by depriving

out-of-state businesses and consumers of competitive advantages which they presently enjoy. Consequently, the Twenty-first Amendment has no bearing on the constitutionality of the Connecticut statute.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JEFFREY I. GLEKEL
Counsel of Record,
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 735-3000

Attorneys for Appellee Anheuser-Busch, Inc.

Of Counsel
Timothy G. Reynolds
Janet E. Schomer

GARY NATEMAN, ESQ.
The Beer Institute
1225 Eye Street, N.W.
Washington, D.C. 20005
(202) 737-2337

Attorney for Appellee The Beer Institute

JEROME I. CHAPMAN
Counsel of Record,
ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Attorneys for Appellee Miller Brewing Company

Of Counsel
Wayne C. Holcombe

WILLIAM H. ALLEN
Counsel of Record,
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-6000

Attorneys for Appellees The Beer Institute, G. Heileman Brewing Company, The Genessee Brewing Company, Inc., All Brand Importers, Inc., Dribeck Importers, Inc., Guiness-Harp Corp., Labatt Importers Inc., Martlett Importing Company, Inc., Monterey Bay Company, Inc., and *Van Munching and Company, Inc.*

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Nos. 88-449, 88-513

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v.

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v.

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REPLY BRIEF FOR THE APPELLANTS JOHN F. HEALY, et al.

CLARINE NARDI RIDDLE
DEPUTY ATTORNEY GENERAL
(ACTING ATTORNEY GENERAL)

ROBERT F. VACCHELLI
Assistant Attorney General
Counsel of Record

RICHARD M. SHERIDAN
Assistant Attorney General

MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
Telephone: (203) 566-7570

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This Brief responds to the Brief for the Appellees, The Beer Institute, et al. ("Brewers"), and to the Brief of the Distilled Spirits Council of the United States, Inc. ("Distillers") and the Commonwealth of Pennsylvania ("Pennsylvania") as Amici Curiae.

ARGUMENT

Certain factual representations made by the Brewers, Distillers and Pennsylvania are incorrect or distorted. They are addressed as follows:

As part of their justification for charging more for beer in Connecticut than in the surrounding states, the Brewers contend that the market in Connecticut is more strictly regulated, and give example by stating that Connecticut law requires exclusive territories for beer wholesalers. Brewers' Brief, p. 4. This is incorrect. Territories are selected and established at the choice of the Brewers. *See* 7 Reg. Conn. Agencies, Liquor Cont. Sec. 30-6-B7 (1985), J.A. at p. 159A; Response to Brewers' 9(c) Statement of Facts, par. 3, J.A. at pp. 152A–53A. Also, their statement that Connecticut prohibits price discounts, also at p. 4, is incomplete. The functional equivalent of such price promotions can be achieved in Connecticut by the use of a non-discriminatory "post off." *United States Brewers Ass'n, Inc. v. Healy*, 532 F. Supp. 1312, 1319 n. 29 *rev'd on other grounds* 692 F.2d 275 (2nd Cir. 1982) *aff'd* 464 U.S. 909 (1983) *(Healy I)*.

The Brewers additionally state that Connecticut "concedes" that the purpose of the beer price affirmation law was to increase the purchase of beer by Connecticut residents within the State "*by eliminating lower beer prices in neighboring States.*" Brewers' Brief, p. 5 (Emphasis added). This is a distortion. Connecticut exerts no control over retail prices in other States. It exerts no control over wholesale prices in other States. By this affirmation law, Connecticut does regulate the Brewers' price of beer, but only when it is imported and sold in Connecticut. Brewers are free to select and change prices in other States, subject only to price rules in those other States. The conclusion of the Court in *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 43 (1966), that "It is by no means clear . . . that [affirmation] must inevitably produce higher prices in other States . . . rather than the lower prices sought for [the affirmation State]," is similarly applicable in the instant case. Indeed, there is no price movement evidence on record in this case.[1]

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[1] Brewers and their Amici attempt to introduce new evidence in this case by citing to a published study which concludes that all affirmation laws

(continued)

The Brewers also complain that there is no evidence in the record to support Connecticut's belief that residents who purchase beer from border-state retailers may violate Connecticut's personal importation restrictions. Brewers' Brief at p. 32 *citing* Conn. Gen. Stat. Sec. 12-436 (Four gallon limit). The basis for the concern about importation violations is obvious. In the past, Connecticut residents have crossed state borders *in significant numbers* to purchase beer at lower retail prices. *Healy I*, 532 F. Supp. 1312, 1316 (Emphasis added). The purpose of the beer price affirmation statute was to lower the price of beer to Connecticut consumers thereby increasing the purchase of beer by Connecticut residents within the state, and generating increased tax revenues. *Id.* The concern here was not an occasional trip by a border resident to a liquor store across the state line. The concern was that . . . "so many of our consumers had gotten in the habit of going across the border." Remarks of Representative Moynihan, J.A. at p. 57A. Even the Brewers admit to widespread shopping of Connecticut residents for beer in neighboring States, when it suits their advocacy. *See* Brewers' Brief, p. 27. The Brewers obviously attempt to dilute the problem Connecticut was trying to rectify. Connecticut, on the other hand, has not forgotten the magnitude of the consumer drain. The threat of violation of the personal importation law is no illusion.

Finally, the Amici Briefs of the Distillers and Pennsylvania describe a parade of horrors in an attempt to demonstrate that if other states promulgate beer affirmation laws, the result could be price gridlock and one, permanent, nation-

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[1] *(continued)*
adversely affect interstate commerce. *See, e.g.*, Brewers' Brief, pp. 20, 26, 37, 38 *citing* Pustay & Zardkooki, *An Economic Analysis of Liquor Price Affirmation Laws: Do they Burden Interstate Commerce?*, 48 La. L. Rev. 649 (1988). A battle of such experts took place in 1982 in the first litigation concerning Connecticut's affirmation law. *See Healy I*, 532 F. Supp. 1312, 1315. The Brewers failed to make their case then. *Id.* at 1326 ns. 49, 50. They cannot seek *de novo* review now on appeal in this second challenge. *See Maine v. Taylor*, 477 U.S. 131, 145 (1986); *Russell v. Southard*, 53 U.S. (12 How.) 139, 159 (1851).

wide price ceiling. *See* Distillers' Brief, pp. 15-18; Pennsylvania's Brief, pp. 10-13. The Court will review the practical effect of the law under the Commerce Clause, *Brown-Forman Distillers v. N.Y. Liquor Authority*, 476 U.S. 573, 583 (1986), but not worst-case hypotheticals. If the hypotheticals were real, then such should have been the national experience by now. Simultaneous affirmation provisions have been in effect with respect to distilled spirits since 1937 and statutory forms of affirmation on distilled spirits have been in effect since 1964. *See* Connecticut's Brief, p. 21. The absence of evidence of national price gridlock demonstrates the real effect of administrative exemptions and the ability of Brewers and other manufacturers to avoid adverse affirmation consequences by the temporary, strategic withholding of products from sale. *See* Connecticut's Brief, p. 13, n. 5.

With these corrections in mind, certain legal issues meriting reply are discussed *seriatim:*

I. THE AFFIRMATION LAW IS NOT PROTECTIONIST BECAUSE ALL PRODUCTS HAVE EQUAL ACCESS TO ALL MARKETS.

Assuming that Connecticut has successfully removed the impermissible extraterritorial effect of its affirmation law by the 1984 amendments promulgated by the Connecticut General Assembly, we maintain that the law does not otherwise constitute protectionist legislation prohibited under the dormant provisions of the Commerce Clause of the United States Constitution. Clearly, the affirmation law does not discriminate against interstate commerce directly: the law applies evenhandedly on its face to all brewers, whether they are local or out-of-state.[2] It does not discriminate against wholesalers. The wholesalers in these border states do not

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[2] Furthermore, there are no in-state brewers to be favored. *The Beer Institute v. Healy*, 849 F.2d 753, 755 (2nd Cir. 1988) *rev'd* 669 F. Supp. 543 (D. Conn. 1987) *(Healy II)*.

directly compete against Connecticut wholesalers. They sell to retailers in their respective states. Indeed, a Connecticut retailer may purchase only from a licensed Connecticut wholesaler. Conn. Gen. Stat. § 30-76.

Nevertheless, the Brewers advocate that the law destroys the competitive advantages of businesses in neighboring states vis-a-vis Connecticut businesses. Out-of-state retailers, they argue, will lose business from Connecticut customers if the price gap narrows, *see* Brewers' Brief, p. 27, and out-of-state consumers will lose if out-of-state retail prices are adjusted upward in response to Connecticut's law.[3] Even assuming that there was empirical evidence of these occurrences in this case (which there is not), such a circumstance does not necessarily constitute unconstitutional protectionism. If it did, no state could ever do anything to improve its economic base, or enact consumer protection legislation. The real test involves product access to markets, and such access remains inviolate in this case.

The landmark dormant commerce clause cases involving movement of goods plainly focus on product access to markets. Where product access is restricted based on economic bias, the law has been struck down. *See, e.g., Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (Law restricted import of Vermont milk to protect New York producers); *Hood & Sons v. DuMond*, 336 U.S. 525 (1949) (Law restricted export of New York milk to protect local producers); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (Law restricted import of Illinois milk to protect Madison, Wisconsin producers); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (Law restricted export of cantaloupes from Arizona to advance prestige of

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[3] The Brewers' presumption in championing the interests of retailers must be accepted with some skepticism. They have no legal interest in, or ability to dictate, such retail prices. Indeed, retail price maintenance in the liquor industry was outlawed as anti-competitive in *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980). The Brewers' interest in accomplishing indirectly that which they cannot do directly should not be countenanced.

local producers); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977) (Law restricted apple imports from Washington to protect North Carolina growers); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (Law barred import of waste into New Jersey). On the other hand, where market access remains equally open, the fact that participants in the distribution chain must conform their practices to local policy does not violate the Commerce Clause. *See, e.g., Breard v. Alexandria*, 341 U.S. 622 (1951) (Restriction on door-to-door salesmen did not harm the market); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (Elimination of producer-owned gas stations did not harm the market); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (Prohibition on plastic milk containers did not stop milk from flowing freely across the Minnesota border). Thus, distributor inconvenience is not a constitutional injury.

The constitution goal involved was simply put by the Court in *Hood & Sons v. DuMond* as follows:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs, duties or regulations exclude them. Likewise, every consumer may look to the full competition from every producing area in the Nation to protect him from exploitations by any. Such was the vision of the founders; such has been the doctrine of this Court which has given it reality.
>
> *Hood*, 336 U.S. 525, 539.

On the other hand, the Court in *Exxon Corp. v. Governor of Maryland* drew the line between unconstitutional protectionism and valid local economic regulation:

> We cannot accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market. *See Breard v. Alexandria*, 341 U.S. 622. As indicated by the Court in *Hughes* [*Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)], the Clause protects the interstate market, not particular interstate firms, from prohibition or burdensome regulations.
>
> *Exxon*, 437 U.S. 117, 127-28; *see also CTS Corp. v. Dynamics Corp. of America*, 107 S.Ct. 1637 (1987).

In the instant case, there can be no question of free access to the products involved. No one argues that their products cannot get to Connecticut consumers, nor that residents of other States cannot get Connecticut products because of Connecticut pricing restrictions. The Brewers complain that their pricing practices are complicated or inconvenienced by the law. However, this is not a constitutional injury. As in *Breard v. Alexandria*, interstate commerce knocks on the door; Connecticut merely regulates the knock so that the interests of the Connecticut consumer may be protected by public, as distinct from private, action. The Brewers' complaint that this could cause them to alter their pricing practices in other States is a threat which could be lodged against any consumer-oriented law Connecticut writes. The fact remains that any business organization which chooses to operate in more than one state will be subject to multiple and even inconsistent regulations. Any such business must simply be prepared to conform its various local operations to more than one set of laws. Regan, *Siamese Essays*, 85 Mich. L. Rev. 1865, 1881 (1987). The test, under the dormant provisions of the Commerce Clause, is market access. Connecticut's law passes the test.

II. THE CASE OF *SEAGRAM & SONS, INC. V. HOSTETTER* SHOULD NOT BE OVERRULED.

The Brewers and Pennsylvania invite the Court to overrule *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). *See* Brewers' Brief, p. 36; Pennsylvania's Brief, p. 36. In that case, the Court upheld New York's 1964 retrospective affirmation law on its face, declaring, "The mere fact that [the affirmation law] is geared to appellants' pricing policies in other states is not sufficient to invalidate the statute." *Id.* at 43. In *Brown-Forman Distillers*, this Court, *in dictum*, questioned the continuing validity of *Seagram*, noting:

> While we hold that New York's prospective price affirmation statute violates the Commerce Clause, we do not necessarily attach constitutional significance to the difference between a prospective statute and the retrospective statute at issue in *Seagram*. Indeed, one could argue that the effects of the statute in *Seagram* do not differ markedly from the effects of the statute at issue in the present case. If there is a conflict between today's decision and the *Seagram* decision, however, there will be time enough to address that conflict should a case arise involving a retrospective statute. Because no such statute is before us now, we need not consider the continuing validity of *Seagram*.
>
> *Brown-Forman*, 476 U.S. 573, 584 n. 6.

Insofar as the affirmation law in the instant case is not of the retrospective variety, this is reason enough to leave the question of the continuing validity of *Seagram* for a more appropriate case.

Furthermore, it is far from clear whether retrospective affirmation could be attacked successfully. Retrospective affirmation does not possess the impermissible extraterritorial thrust condemned in *Brown-Forman*. *See* Regan, *Siamese*

Essays, 85 Mich. L. Rev. 1865, 1905 (1987) *but see* Greenberg, *Note, Liquor Price Affirmation Statutes and the Dormant Commerce Clause*, 86 Mich. L. Rev. 186 (1987). Nevertheless, such a law must still be tested concerning its effect on market access, a task clearly outside the scope of this appeal.

Thus, to the extent that the *Seagram* case holds that out-of-state price referencing does not, in itself, violate the Commerce Clause, the case is still good law. It is not out of line with the landmark dormant Commerce Clause cases. Indeed, in other contexts, uniformity in state liquor regulation has been compelled. *See South Dakota v. Dole*, 107 S.Ct. 2793 (1987) (Uniform drinking age requirement for transportation funds upheld).

III. THIS APPEAL SHOULD BE RESOLVED IN FAVOR OF CONNECTICUT ON THE ISSUE OF INDIRECT BURDEN ON INTERSTATE COMMERCE.

The Brewers do not discuss the constitutionality of Connecticut's beer affirmation law under the second tier of the Commerce Clause test for state economic regulation: that which involves balancing indirect burdens on interstate commerce against the State's interest at stake. *See Brown-Forman*, 476 U.S. 573, 579. The issue was resolved in Connecticut's favor in the trial court below. *See The Beer Institute v. Healy*, 669 F. Supp. 543, 553 (D. Conn. 1987) *rev'd on other grounds* 849 F.2d 753 (2nd Cir. 1988) *(Healy II)*; J.A. at p. 184A. On appeal in the Second Circuit the issue was not reached, but this Court noted probable jurisdiction over the issue in the companion case of *Wine and Spirits Wholesalers of Connecticut, Inc. v. The Beer Institute, et al.*, No. 88-513. We continue to urge the Court to resolve the issue in favor of Connecticut as argued in Connecticut's Brief at pp. 20–22.

CONCLUSION

In all other respects, the Appellants rely on their Brief dated December 29, 1988, and urge the Court to order the judgment of the United States Court of Appeals for the Second Circuit be reversed, and the case remanded with instructions to enter judgment for the Appellants.

Respectfully submitted,
John F. Healy, et al.

CLARINE NARDI RIDDLE
DEPUTY ATTORNEY GENERAL
(ACTING ATTORNEY GENERAL)

ROBERT F. VACCHELLI
Assistant Attorney General
Counsel of Record

RICHARD M. SHERIDAN
Assistant Attorney General

MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
Tel. (203) 566-7570

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Supreme Court Of The United States

OCTOBER TERM, 1988

JOHN F. HEALY, et al.
Appellants,

v.

THE BEER INSTITUTE, et al.
Appellees.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.
Appellants,

v.

THE BEER INSTITUTE, et al.
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE APPELLANTS WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.

WILLIAM A. WECHSLER
BAILEY AND WECHSLER
Counsel of Record
(A Member of the Bar of
the U.S. Supreme Court)

ALFRED F. WECHSLER
GREGORY J. SOUTHWORTH
BAILEY AND WECHSLER
Counsel of Record

66 Forest Street
Hartford, CT 06105
TELEPHONE: (203) 525-9191

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ARGUMENT

I. THE TWENTY-FIRST AMENDMENT EMPOWERS CONNECTICUT TO REGULATE THE PRICE OF LIQUOR WITHIN ITS BORDERS.

A. The Twenty-First Amendment Empowers Connecticut To Establish A Competitive Price For Beer Sold Within Its Borders.

Pursuant to the Twenty-First Amendment, Connecticut has the power to regulate all aspects of the sale of liquor within its borders. The mandate of the Twenty-First Amendment vesting authority to the states to regulate the trade in liquor is clear:

> ". . . the transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Constitution Amendment XXI, Section 2.

This Court has further interpreted the Twenty-First Amendment as conferring upon the states the broad power "to regulate the times, places and circumstances under which liquor may be sold." *New York State Liquor Authority v. Bilanca*, 452 U.S. 714 (1981); *See also Duran v. Salem, Inc.*, 422 U.S. 911 (1975); *Zifferin, Inc. v. Reeves*, 308 U.S. 132 (1939); *California v. LaReau*, 409 U.S. 109 (1972). Such broad language relative to "circumstances" certainly includes the power to regulate price.

Moreover, this Court has ruled that a state's powers pursuant to the Twenty-First Amendment reach so far as to sanction total prohibition of alcoholic liquor within a state. *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 330 (1964). A state therefore acts within its constitutional powers in

enacting lesser degrees of regulation. *See Bacchus Importers, Ltd. v. Dias*, 468 U.S. 263, 284 (1984).

It is well-settled that the Twenty-First Amendment carves a unique exception to the normal Commerce Clause limitations on trade. Simply put, liquor is a unique commodity and not, as Appellees assert, the constitutional equivalent of other goods such as milk. *Craig v. Boren*, 429 U.S. 190 (1976); *United States Brewers Assn. v. Healy*, 669 F. Supp. 543, 599 (D. Conn. 1987); *See also Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *State Board of Equalization v. Young's Market Company*, 299 U.S. 59, 62-63 (1936).

Despite the well-settled differences in the regulation of liquor as opposed to other goods, Appellees persist in promulgating an erroneous constitutional analysis relying on misplaced Commerce Clause arguments equating beer to milk. *See* Appellees Br. 17, 24-26. At issue in this appeal is the regulation of liquor, a commodity clearly distinguishable from all others by virtue of its regulation under State and Federal statutes and the Twenty-First Amendment to the Constitution. Appellees conclude their brief by asserting that the Twenty-First Amendment has no bearing on the constitutionality of the Connecticut statute. Appellees Br. 41. Presumptuous constitutional revisionism has no place in a brief before this Court. It is for Congress, and not the Appellees in this action, to repeal the Twenty-First Amendment. The Twenty-First Amendment cannot be ignored.

Pursuant to its Twenty-First Amendment powers, the State of Connecticut can determine equitable pricing for beer within its borders. The State, in exercising its constitutional authority, could establish and enforce arbitrary and excessive prices for beer each month, or for that matter artificially low prices without reference to the prevailing prices in other states. Appellees, as licensees exercising their prerogative to conduct

business in Connecticut, would be bound by any such unilateral pricing policies. *See Fisher Foods, Inc. v. Ohio Dept. of Liquor Control*, 555 F. Supp. 641 (D. Ohio 1982); *U.S. Brewers Assn. v. Director of New Mexico Dept. of Alco. Bev. Control*, 1045 S.Ct. 1581 (1983).

The Connecticut Affirmation Statute, however, requires that a competitive, not arbitrary, price be posted in Connecticut. The Connecticut statute insures this competitive and equitable pricing by *referencing* regional prices in its border states. Conn. Gen. Stat. Sections 30-63, 30-63b(b). Connecticut accomplishes this competitive parity by requiring Appellees to affirm that at the *moment* of posting prices in Connecticut, Connecticut wholesalers receive the lowest competitive price offered in a border state. Conn. Gen. Stat. Section 30-63b(b). To avoid arbitrary pricing, the Connecticut law ensures market pricing by requiring harmonization of its prices with those prices charged in border states.

Connecticut's method of referencing prices is analogous to banking institutions and employment agreements which reference the Federal Reserve or the Consumer Price Index in establishing interest rates and cost of living adjustments. Certainly Appellees would not suggest that referencing out-of-state prices constitutes regulation of out-of-state prices, any more than referring to the Federal Reserve or the Consumer Price Index constitutes regulation of the Federal Reserve or Consumer Price Index.

B. The Connecticut Statute Does Not Regulate The Price Of Beer Beyond Its Borders.

Connecticut cannot, and its affirmation statute does not, regulate the prices established by Appellees in other states. While Connecticut cannot tell the Brewers what price to post in other states, those states may, in exercising their legitimate Twenty-First Amendment authority, regulate the liquor trade and prices within their borders through their own regulations.

In fact, Connecticut General Statutes specifically recognize the Appellee's rights to change prices at any time in any other state:

> This section shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any time during the calendar month covered by such posting. Conn. Gen. Stat. Section 30-63b(e).

Despite Connecticut's specific recognition of Appellees' authority to change prices in other states at any time, Appellees claim that the interaction of the Connecticut statute with border states' statutes constitutes an unconstitutional extraterritorial effect. Appellees Br. 18–23. It is not the Connecticut statute which prevents the Appellees' pricing flexibility, but rather the posting regulations of other states which arguably have adverse extraterritorial effects on the Connecticut statute.

The Commerce Clause does not grant private brewers and importers the right to make artificial and arbitrary pricing decisions relative to each of the fifty states. Regulation on a state-by-state basis has necessarily mandated the creation of fifty independent state "markets." Given that brewers and importers generally choose to operate by applying for licenses and/or selling to each state, there is no dispute that pricing decisions in one or more states may ultimately affect internal corporate decisions relative to pricing in other states. The Commerce Clause, however, does not operate to protect manufacturers or importers from making business or pricing decisions which must comport with each state's constitutionally mandated laws.

Appellees erroneously attribute Commerce Clause protection to pricing decisions allowing them to manipulate prices

in Connecticut and other states. The fact that Appellees may have to comport with state law in making pricing decisions in each of the fifty states is simply a function of the Twenty-First Amendment.

Should Appellees wish to restructure the national liquor distribution system, recourse to Congress in an attempt to rescind the Twenty-First Amendment may be the most appropriate course available. In any event, Appellees' claim that the Connecticut affirmation statute interferes with their ability to enforce arbitrary and artificial pricing decisions does not constitute sufficient grounds to overturn the statute.

II. THE CONNECTICUT AFFIRMATION STATUTE IS NOT PROTECTIONIST BECAUSE IT ENSURES COMPETITION AND ECONOMIC PARITY FOR BEER WHOLESALERS.

A. The Connecticut Statute Eliminates Appellees' Artificial And Arbitrary Pricing Of Beer In The State Of Connecticut.

In that the national liquor distribution system is composed of fifty independent state "markets," Appellees' claims that beer prices are determined by market forces are erroneous.

As a result of the creation of fifty artificial state "markets" and the establishment of statewide pricing regulations in most states, both the wholesale and retail price of beer may have very little to do with specific market conditions. The New York ABC Law, for example, legislates a 180-day statewide price to wholesalers, with any subsequent increases or decreases to be passed on uniformly. N.Y. Alco. Bev. Cont. Law Section 55-6 (McKinney 1987). Appellees' claims that prices in the Connecticut region will be distorted by the Connecticut affirmation law are erroneous insofar as beer prices are invariably *a priori* distorted by the creation of artificial

markets. As is the case in New York State, for example, posting statewide prices for 180 days with uniform increases and decreases only accentuates market distortion. Connecticut does not engage in this type of activity. In any event, Appellees' claims that beer prices are presently determined by market conditions are specious.

Appellees persist in asserting an erroneous economic analysis in claiming that the Connecticut affirmation statute removes indigenous competitive "advantages" from wholesalers in Connecticut's border states. The importers and brewers in compliance with extraterritorial beer statutes in other states determine prices to wholesalers. Free market economics have virtually nothing to do with actual prices.

In claiming that Connecticut's statute constitutes protectionism, Appellees turn Commerce Clause principles on their head. The Connecticut statute, contrary to Appellees' assertions, eliminates an arbitrary, artificial and permanent competitive disadvantage the Appellees would be able to impose on Connecticut wholesalers under their proposed interpretation of the Twenty-First Amendment. In contrast, Connecticut law simply harmonizes pricing between its wholesalers and counterparts in border states. It is the Connecticut statute which eliminates competitive disadvantages and price discrimination otherwise arbitrarily imposed on Connecticut wholesalers.

B. Appellees Lack Standing And Have Failed To Carry Their Burden Of Proof In Asserting Wholesalers' And Retailers' Speculative Grievances.

Appellees lack standing to make their misplaced protectionist claims. *See* Appellees Br. 23-33. Any theoretical "advantage" that may be surrendered as a result of the Connecticut statute belongs to hypothetical out-of-state wholesalers or control states. Moreover, wholesalers in unconcentrated markets such as Lake George, New York, would

clearly not normally have an indigenous advantage over those in a much more concentrated market such as Bridgeport, Connecticut. Connecticut has no in-state brewers or importers of beer who sell only within the state. The Connecticut statute therefore does not protect any in-state brewers or importers at the expense of out-of-state brewers or importers. The question of standing also extends to the actual operation of the national liquor distribution system and brings into question the motives of the brewers and importers.

In that there is a single source manufacturer or importer for each brand of beer, each brewer should only be concerned with market accessibility and ultimately penetration of his products into each state market. The ultimate sale, whether it occurs in Connecticut or its border states, is irrelevant to a brewer or importer provided his products have reached each state. There is no claim that Appellees have been prevented from accessing or penetrating the Connecticut or any other market as a result of the Connecticut statute. Rather, Appellees allege hypothetical injuries relating to alleged "competition" at the retail level. Appellees Br. 26-27.

In asserting Commerce Clause arguments on behalf of border state wholesalers and retailers, Appellees claim that the Connecticut statute interferes with retail prices in other states. Appellees, who arguably have no interest in retail competition, seem to in effect claim harms associated with interference of retail pricing. Appellees' interest in retail pricing and possible manipulation of retail pricing is suggestive of institutionalizing resale price maintenance on a state-by-state basis. Resale price maintenance and price discrimination, however, are clearly prohibited under the Sherman Act and federal anti-trust statutes. 15 U.S.C.S. Section 113 (1985); *See Schnapps Shops, Inc. v. H.W. Wright & Co.*, 377 F. Supp. 570 (D.C. Md. 1973). Appellees cannot have it both ways: either they are claiming injuries associated with promulgating arguably unlawful resale price maintenance pricing policies or they must restrict their Commerce Clause analysis to commerce at the manufacturer or importer to wholesaler level. There has

been no claim, however, that the Connecticut affirmation statute inhibits sales to wholesalers in any state.

Appellees moreover have not alleged any quantifiable economic injury resulting from the Connecticut statute. To this extent, Appellees ask this Court to engage in conjecture and speculation reminiscent of that unsuccessfully sought after in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). It is virtually inconceivable that in the course of this litigation, and litigation involving liquor affirmation nationwide, the Appellees have not introduced a scintilla of evidence demonstrating economic harm. Appellants urge this Court to reject Appellees' claims of protectionism in the absence of any harm other than alleged speculative injury to businesses and consumers not party to this action.

C. The Connecticut Statute Eliminates Competitive Disadvantages To Connecticut Wholesalers Which Appellees Erroneously Attribute To Market Conditions And Price Discounting Practices.

The Connecticut statute was legislated for the legitimate purpose of eliminating artificial discriminatory pricing by Appellees. Prices of beer have historically been higher in Connecticut than its border states. Appellees Br. 2. Despite Appellants' inquiries, Appellees have never been able to explain or justify why Appellees, both brewers and importers, set higher prices for sale to wholesalers in Connecticut than to its border states. It is apparent on its face that artificially higher prices in one state may serve to subsidize lower prices in another. Institutionalizing this scheme smacks of promoting the failed policies of centralized economic planning.

Appellees have suggested that lower prices in Connecticut's border states may be a function of volume discounting and/or inversely, Connecticut's own liquor regulations. Appellees Br. 4. Appellees' assertions that volume discounting exists in Connecticut's border states and may create

competitive advantages for wholesalers in those states are simply wrong. Volume discounting between brewers or importers and wholesalers does not exist in New York or in any other state with price posting laws in that the same FOB prices are charged by brewers to any wholesaler in a particular state regardless of the volume purchased. Moreover, Appellees have never introduced any evidence to suggest that such volume discounting practices exist. There may be quantity discounts, however, for single transactions, as distinguished from volume discounts, between wholesalers and retailers or retailers and consumers under New York's ABC liquor law.

Connecticut's regulation of liquor is hardly the most stringent in the four-state region at issue in this appeal. For example, New York law requires that prices be maintained for at least 180 days before prices can be increased. *See* Appellees Br. 19. This 180-day posting requirement is certainly more rigid than Connecticut's 30-day price posting regulation. Moreover, Courts have found that the New York 180-day pricing statute is in harmony with the Commerce Clause and does not constitute an antitrust violation in that it preserves competition. *Best Way Beer & Soda Distributors, Inc. v. N.Y. State Liquor Authority*, 99 App. Div. 2d 727 (1984). The less stringent 30-day posting requirement in Connecticut coupled with price affirmation was similarly enacted to achieve and ensure competition.

Despite Appellees' representations to the contrary, New York requires statewide pricing for the sale of beer to wholesalers. *See* N.Y. Alco. Bev. Cont. Law Section 55-b(2). As a result of statewide pricing and statewide territories, a statewide New York wholesaler may benefit from alleged volume discounting and sales of beer in another market within the state with no reference to the alleged indigenous market forces. As noted above, however, the statewide price and alleged volume discounting have no relation necessarily to the markets where a wholesaler ultimately may sell beer within the state.

For example, a New York City wholesaler buying 1,000,000 cases of beer may benefit from an alleged volume discount. In practice, however, there simply are no volume discounts. In theory, a volume discount should relate to volumes purchased in reliance on the concentration of the particular market. New York City wholesalers would presumably therefore benefit most from alleged volume discounts as a result of New York City's market concentration. However, a New York City wholesaler, benefitting from an alleged volume discount on 1,000,000 cases of beer, may then choose to sell 950,000 cases in New York City and ship the remaining 50,000 cases to another market, such as Lake George. In that the local price of beer in Lake George would otherwise be higher than that of beer in New York City, again as a function of market concentration, as a result of statewide wholesale pricing, beer is sold to wholesalers at an artificially low price for resale in Lake George. The 50,000 cases of beer distributed to Lake George were purchased at an alleged volume discount having no relation whatsoever to the actual market concentrations of Lake George. Enforcing such a pricing scheme, with no relation to true market forces, would place Connecticut wholesalers at a permanent and arbitrary economic disadvantage vis-a-vis their New York counterparts, particularly those in areas bordering New York State such as Bridgeport and Danbury who operate within 75 miles of New York City, arguably within the Metropolitan New York City Market. Connecticut legislates against this scheme by referencing prices in border states.

At issue before this Court is Connecticut's constitutionally prescribed powers to regulate beer and eliminate artificial price discrimination. Connecticut does not regulate prices in its border states; Appellees are free to set and change prices in those states at any time. The Connecticut statute, however, ensures that arbitrary and artificial price discrimination will not be permitted in Connecticut solely to subsidize lower prices elsewhere or allow Appellees to achieve their targeted profit margins at the expense of Connecticut wholesalers. In harmony with both the Commerce Clause and Twenty-First

Amendment, the State of Connecticut has exercised its constitutional authority in insisting that brewers and importers engage in competitive pricing as a prerequisite to engaging in commerce relating to beer within Connecticut.

CONCLUSION

The Twenty-First Amendment empowers Connecticut to regulate the price of liquor within its borders. The Twenty-First Amendment authorizes Connecticut to establish a competitive price for beer sold within its borders. The Connecticut statute does not regulate the price of beer beyond its borders.

The Connecticut Affirmation Statute is not protectionist because it ensures competition and economic parity for beer wholesalers. The Connecticut statute eliminates Appellees' artificial and arbitrary pricing of beer in the State of Connecticut. Appellees lack standing and have failed to carry their burden of proof in asserting speculative grievances. The Connecticut statute eliminates competitive disadvantages to Connecticut wholesalers which Appellees erroneously attribute to market conditions. The Connecticut affirmation statute harmonizes the Twenty-First Amendment and Commerce Clause of the U.S. Constitution.

For all the foregoing reasons, we respectfully request that the Court enter an order summarily reversing the decision of the United States Court of Appeals for the Second Circuit and affirming the judgment of the United States District Court for the District of Connecticut. In the alternative, if appropriate, we urge the Court to reverse the decision of the U.S. Court of Appeals for the Second Circuit and remand this case to the lower court on the sole issue of the constitutionality of Connecticut statute as applied.

Respectfully submitted,

Wine and Spirits Wholesalers of Connecticut, Inc.

WILLIAM A. WECHSLER
BAILEY AND WECHSLER
Counsel of Record
(A Member of the Bar of
the U.S. Supreme Court)

ALFRED F. WECHSLER
GREGORY J. SOUTHWORTH
BAILEY AND WECHSLER

66 Forest Street
Hartford, CT 06105
Telephone: (203) 525-9191

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No. 88-449, 88-513

IN THE

Supreme Court of the United States

October Term, 1988

JOHN F. HEALY, *et al.*,

Appellants,

v.

THE BEER INSTITUTE, *et al.*,

Appellees.

WINE & SPIRITS WHOLESALERS OF CONNECTICUT, INC.,

Appellants,

v.

THE BEER INSTITUTE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Motion for Leave to File Brief as *Amicus Curiae* and Brief of Wine and Spirits Wholesalers of America Inc. as *Amicus Curiae* in Support of Appellants

DOUGLAS W. METZ
1023 Fifteenth Street N.W.
Fourth Floor
Washington, D.C. 20005-2602
Counsel of Record and
Attorney for Amicus Curiae
Wine and Spirits Wholesalers
of America, Inc.

Dated: December 29, 1988

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Motion of Wine and Spirits Wholesalers of America, Inc., For Leave to File Accompanying Brief as *Amicus Curiae*.

Pursuant to the rules of the Court, the Wine and Spirits Wholesalers of America, Inc. ("WSWA") respectfully moves for leave to file the accompanying brief as *amicus curiae*. WSWA's arguments support appellants in this

consolidated appeal. Both appellants have consented to the filing of WSWA's brief.

Interest of WSWA

Founded in 1943, WSWA is the major national trade association for wholesale distributors of domestically produced and imported distilled spirits and wines, representing a constituency of more than 800 members in 44 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands. Numerous WSWA members also are wholesale distributors of domestic and imported beers and malt beverages. WSWA's mission is the advancement of the interests of independent wholesale distributors, consumers and the public-at-large pertaining to industry matters and, to that end, to encourage and support sound and equitable federal and state regulations for responsible marketing and consumption of all alcoholic beverages. WSWA is dedicated to the preservation of the principle of free enterprise, under sound regulations, uniformly applied, and of the *current* balance of state and national regulatory authority over commercial aspects of the alcoholic beverage industry embodied within the Twenty-First amendment to the United States Constitution.

Most WSWA member wholesalers do business pursuant to wholesale licenses issued by "open" or "license" states. ("Open" or "license" states permit alcoholic beverage importation and distribution by private enterprise as distinguished from those few "monopoly" or "closed" states in which the state itself operates the wholesaling business for one or more types of alcoholic beverages.) In recognition of the ever-increasing modern-day importance for government regulation of alcoholic beverages, which fuel significant state revenues and a panoply of state economic development interests, the open states subject each

separate level of trade (*i.e.*, producers, wholesalers and retailers) to stringent and highly detailed but purposefully integrated regulatory complexes. Reflecting the unique demographic, economic and political character and individual public priorities and policies of each state, these regulatory systems differ somewhat from state to state and from beverage to beverage.

The decision appealed from invalidates, as a direct regulation of interstate commerce in violation of the commerce clause, the beer price affirmation provisions of the Connecticut Liquor Control Act, Conn. Gen. Stat. Sections 30-63 a(b), b(b), c(b) and b(e). The provisions held unconstitutional require brewers and out-of-state importers "post" their prices to Connecticut wholesalers for the following month, require that the brewers and importers may not quote or charge a price higher than any wholesale price currently charged by that suppliers to wholesalers in any adjoining state, require that the supplier affirm with its filing that at a precise moment in time—the moment of posting—the price charged to Connecticut wholesalers is no higher than the lowest price then charged any adjoining states' wholesalers, and require brewers offer and supply Connecticut wholesalers all packages and sizes of their brands offered to their adjoining states wholesalers. Section 30-63b(e) of the Connecticut Liquor Law added in 1984 expressly states that the statute complex does not prohibit brewers from changing prices in any adjoining state or states "at any time during the calendar month covered by such posting." Connecticut has identical statutory provisions covering wines and distilled spirits.

Affirmation and wholesale price posting are integral parts of Connecticut's broader, comprehensive regulatory scheme governing virtually every aspect of the operations

of the alcoholic beverage industry in Connecticut. In the words of the Trial Court, these provisions serve "a legitimate purpose in reducing discrimination in pricing to wholesalers in Connecticut as opposed to out-of-state wholesalers". That is a particularly apt and appropriate subject of legislative concern for Connecticut, which is the only state with price affirmation covering beer. The Connecticut Legislature justifiably has sought to obviate predatory geographic price discrimination. See *e.g., Fall City Industries v. Vanco Beverage,* 460 U.S. 428 (1983); *Best Brands Beverage Inc. v. Falstaff Brewing Corp.,* 842 F. 2d 578 (2 Cir. 1987); *Best Brands Beverage Inc. v. Falstaff Brewing Corp.,* 653 F. Supp. 47 (SDNY 1985); *Anheuser-Busch Inc. v. FTC,* 289 F. 2d 835 (7 Cir. 1961).

Connecticut's affirmation approach to the subject is materially identical to that taken by Tennessee to assure its alcoholic beverage wholesalers received "most favored customer" prices from their suppliers. In sustaining the constitutionality of the Tennessee alcoholic beverage affirmation statute, the Sixth Circuit, in direct conflict with the Second Circuit's decision in the instant appeal, found any impact the statute may have on the interstate alcoholic beverage market, or interstate marketers' prices to wholesalers or those revenues and profits does not constitute a direct regulation of product prices in other states and is sanctioned by the Twenty-First Amendment. *Brown-Forman Corporation v. Tennessee Alcoholic Beverage Commission,* Nos. 87-5870/87-5913, slip op. (6th Cir. Nov. 4, 1988). WSWA filed a brief *amicus curiae* supporting the constitutionality of the Tennessee law in that Sixth Circuit proceeding.[1]

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[1]WSWA also appeared *amicus curiae* before this Court in *Brown-Forman Distillers v. New York State Liquor Authority,* 476 U.S. 573 (1986).

As pointed out in the State of Connecticut's Jurisdictional Statement in No. 88-449, affirmation laws covering alcoholic beverages are currently enforced or are in litigation in seven license states or are purchase contract requirements in eighteen control states. At least eleven license states have price posting regulations requiring suppliers to file wholesale prices and to abide by them for stated time periods.

Thus, WSWA members in Connecticut, Tennessee and other affirmation and posting states have a vital interest in sustaining the constitutional validity of affirmation and favorably resolving the conflict in the lower circuits on the issue of whether similar alcoholic beverage affirmation statutes are constitutional under the Commerce Clause of the United States Constitution, U.S. Const. art. 1, Sec 8, cl. 3 or the Twenty-First Amendment, U.S. Const., Amend. XXI, Sec. 2 or Supreme Court precedent. That interest is wholly consistent with the public interest and state concerns apparent or express in the Connecticut affirmation and price posting provisions—and within the Tennessee scheme—namely, to curb or prohibit geographic price discrimination, its anticompetitive and incipient monopolistic tendency and its resultant economic domination by alcoholic beverage suppliers of their wholesale distributors and, in turn, retail outlets and the consuming public.[2]

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[2]Connecticut Liquor Law's regulation of the commercial aspects of alcoholic beverages goes beyond its most apparent interest in moderating the consumption and marketing of liquor, wine and beer and its concern for tax revenues. The wholesale trade's contribution to the state's economic health and development is recognized in the Connecticut Supreme Court's expression that the state's weighty core regulatory concern includes every aspect of the relationship between alcoholic beverage suppliers and their Connecticut wholesalers and the "social and economic problems created by sudden termination of the

(Footnote continued on following page)

WSWA members have a second and equally compelling interest in this appeal. It is the extent to which this Court's analytical approach and decision in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966) remains good law after the decision in *Brown-Forman Distillers v. New York State Liquor Auth.*, 106 S. Ct. 2080 (1986), Virtually every aspect of the operations of licensed wholesalers is subject to comprehensive regulation by the states in which they operate. Invalidation of affirmation or further severe questions as to the precedential authority and guidance to be found in the *Seagram* decision would in all likelihood have an effect on other related areas of state regulation of alcoholic beverages, threatening fundamental changes in the structure, competitive tenor and governmental regulation of the alcoholic bever-

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(Footnote continued.)

franchises." *Schieffelin v. Department of Liquor Control*, 194 Conn. 165, 181, 479 A.2d 1191 (Conn. 1984), wherein the Connecticut Supreme Court stated:

> "In addition (to the affirmation and posting provisions), there are provisions precluding rebates, free goods and tie-in sales. Gen. Stat. §30-94. These and other provisions of Connecticut statutes relating to credit, advertising, etc., make it apparent that Connecticut intends to and does control the supplying out-of-state shipper . . . to make certain that the owner of the brand name, out-of-state shipper, cannot dominate or control the Connecticut wholesalers. To promote this latter purpose, Connecticut has imposed statutory restrictions on the shipper's ability to terminate the authority of a wholesaler to distribute its products. Brennan, 'Liquor Control,' 54 Conn. B.J. 611, 613-14."

See also All Brand Importers, Inc. v. Department of Liquor Control, No. CV87-0332170S slip op. at 11-12 (Ct. Super. Ct., Hartford Dist., Dec. 6, 1988).

age industry in this country and consequent uncertainty, dislocation and economic harm.[3]

This WSWA concern goes beyond simple fear of an unsettling commercial precedent. It speaks to the policy and enforcement chaos potentially wrought on state legislators and administrators, who since 1935 repeal have confidently exercised plenary authority and discretion to regulate alcoholic beverage marketing by their jurisdiction's resident wholesalers and retailers. It speaks to the resulting enormous uncertainty among those who are regulated as to the validity of the well-tested, tightknit, and administratively successful programs governing the manner and methods they employ in virtually every step of their purchasing, marketing, physical distribution and financial operations. At risk in the potential answer to the fundamental question before this court as to the permissible scope of a state's right to regulate under the Twenty-First Amendment is the probable "deregulatory" erosion of the weight and paramountcy of states' alcohol control and economic regulatory authority. With quickly evolving national, continental and global markets for alcoholic beverages, a reduction of state regulatory authority or diminishment of the substantial and predominant character of state alcoholic beverage concerns and interests will have serious consequences for WSWA members.

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[3]See note 2, *supra*, for some types of these related areas in which Connecticut and other state alcoholic beverage regulations are dependent for their constitutional validity upon this Court's view as to the permissible scope of the Twenty-First Amendment and its interplay with the commerce clause principles. See *e.g. Schiefflin v. Department of Liquor Control, supra*, at 182-84 (upholding Connecticut's franchise termination regulations on Twenty-First Amendment grounds) and, to some effect, *Crowley Beverage Company v. Miller Brewing Company*, No. 88-5055, slip op. (8th Cir. December 6, 1988).

In this brief, WSWA believes that it presents matters germane to the Court's decision that may not be treated or may not be developed fully by the appellants because of their more focused perspectives.

For the foregoing reasons, *amicus* respectfully requests leave to file the accompanying brief.

Respectfully submitted,

DOUGLAS W. METZ
1023 Fifteenth Street NW
Fourth Floor
Washington DC 20005-2602

Counsel of Record and Attorney for Amicus Curiae Wine and Spirits Wholesalers of America Inc.

December 29, 1988

No. 88-449, 88-513

IN THE

Supreme Court of the United States

October Term, 1988

JOHN F. HEALY, *et al.*

Appellants,

against

THE BEER INSTITUTE, *et al.*

Appellees.

WINE & SPIRITS WHOLESALERS OF CONNECTICUT, INC.

Appellants,

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THE BEER INSTITUTE, *et al.*

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief of Wine and Spirits Wholesalers of America, Inc. as *Amicus Curiae* in Support of Appellants

DOUGLAS W. METZ
1023 Fifteenth Street NW
Fourth Floor
Washington, DC 20005-2602
Telephone: 202-371-9792

A member of the Bar of the Supreme Court Counsel of Record and Attorney for Amicus Curiae Wine and Spirits Wholesalers of America, Inc.

Dated: December 29, 1988

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Interest of the Amicus.

The interest of WSWA in this matter has been set forth in the accompanying motion for leave to file brief as *amicus curiae.*

Statement of the Case.

This appeal is addressed to the constitutionality of the affirmation provisions of Connecticut's comprehensive scheme regulating the manufactuing, distribution and sale of alcoholic beverages in the state. Conn. Gen Stat. Sections 30-63 a(b), b(b), c(b), and b(e).

The State of Connecticut attempted to remedy the constitutional infirmity of its affirmation laws in conformance with the Second Circuit's opinion in Healy I. *United States Brewers Ass'n, Inc. v. Healy,* 692 F.2d. 275 (2d Cir., 1982), *aff'd,* ____ U.S. ____, 104 S.Ct. 265, 78 L.Ed.2d 248 (1983). Connecticut's amended affirmation law was challenged, upheld by the district court, but reversed by the Second Circuit in Healy II. *The Beer Institute v. Healy,* 849 F.2d. 753.

Meanwhile, the Sixth Circuit has upheld Tennessee's affirmation law in a reversal of an opinion of a district court.

SUMMARY OF ARGUMENT.

This appeal presents straightforward questions of constitutional law: (1) Whether the "beer price affirmation and posting" provisions of the Connecticut Liquor Control Act, Conn. Gen. Stat. § 30-6 *et seq.* separately, or in conjunction with each other, have the effect of determining brewers' specific prices in states adjoining Connecticut, thereby directly regulating those prices and imposing an impermissible burden on interstate commerce, and, (2) if so, whether the Twenty-First Amendment shields that state's legislative initiative to prohibit, or at the least, inhibit, predatory and geographic price discrimination among brewers serving regional and national markets. *Amicus* respectfully submits that the answer to the first question is clearly "no," in that the asserted extraterritorial effects of the beer price affirmation provisions on the actual prices and discounting practices of the appellee brewers have not been substantiated and remain matters of pure "conjecture." Even if the question is answered otherwise, the answer to the second is a clear, resounding "yes."

In the twenty-two years since the Court rejected an abstract facial challenge to the first alcoholic beverage price affirmation law in *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35 (1966), similarly-targeted anti-discrimination laws have been enacted by numerous states. Today, materially identical affirmation provisions requiring that suppliers' wholesale transactions into a state are priced effectively on a "most favored customer" basis are enforced in seven license states. They are ostensibly supported by a recognition that Section 2 of the Twenty-First Amendment is "unique in the constitutional scheme in that it represents the only express grant of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to

one product—intoxicating liquors", *Castlewood International Corp. v. Simon,* 596 F.2d 638, 642 (5 Cir. 1979), *vacated and remanded* 446 U.S. 949, 100 S.Ct. 2914, *panel opinion reinstated* 626 F.2d 1200 (5 Cir. 1980); that, as stated by Justice Rehnquist, Section 2 of the Twenty-First Amendment confers "something more than normal state authority over public health, welfare and morals", *California v. LaRue,* 409 U.S. 109, 114, 93 S.Ct. 390, 395, 34 L.Ed.2d 342, 349-50 (1972); that because of the Twenty-First Amendment a state statute regulating the sale of alcoholic beverages is entitled to an "added presumption in favor of (its) validity", *New York State Liquor Authority v. Bellanca,* 452 U.S. 714, 718, 101 S.Ct. 2599, 2602, 69 L.Ed. 2d 357 (1981) (*per curiam*) (quoting *California v. LaRue,* 409 U.S. at 118, 93 S. Ct. at 397, 34 L. Ed. 2d at 352); and *Seagram's* guideline that insuring a state's alcoholic beverage trade and consumers nondiscriminatory prices is a legitimate and weighty state concern.

Surely the efficacy of a state's administration and enforcement of such legislation also rests squarely upon *Seagram's* further assurance that a state's affirmation regulations can be subject to constitutional condemnation on Commerce Clause grounds only upon a competent demonstration of concrete marketplace experience making it "clear" the law "must inevitably produce" prices in other states other than those which would exist absent the challenged regulations. *Seagram, supra* at 43. Undoubtedly, any lesser evidentiary standard would require a reviewing court erroneously to indulge in "matters of conjecture", upon which constitutional invalidity cannot and must not be premised. But that is precisely what the Court of Appeals did below. It found Connecticut's affirmation provisions operate "to control prices beyond Connecticut's borders" and have restricted "a brewer's ability to offer

volume discounts in the border states". This conclusion was based on a record absolutely devoid of competent current evidence pertaining to the affirmation provision's actual impact on the interstate beer markets or market in which appellee brewers operate, the actual prices charged in any interstate market, or, for that matter, in Connecticut, New York, Massachusetts and Rhode Island. Neither does the record sustain any conclusion respecting whether such brewers *in fact* ever offer to sell or sell beer at volume discounted prices to their franchised wholesalers or others in those states or anywhere in the United States.

In the case at bar, there is no record of the brewers' concrete marketplace experience and, as in *Brown-Forman Corporation v. Tennessee Alcoholic Beverage Commission, supra,* it is impossible for this or any tribunal clearly to determine to what extent any of the brewers may have actually raised prices or have refrained from lowering prices or offering volume discounts in any relevant marketplace.

However, even if the record sustains some extraterritorial influence or impact (such as a timing delay in brewers' implementation of a pricing decision for a state) for which the causal nexus is the challenged Connecticut affirmation provisions, *Amicus* submits that influence, impact or delay is indirect and incidental to legitimate state alcoholic beverage control legislation upon any interstate marketer of alcoholic beverages, and the Connecticut Liquor Law provisions in issue are shielded from constitutional condemnation on Commerce Clause grounds by operation of the Twenty- First Amendment as an apt, justified and appropriate state initiative to curb predatory intrastate and geographic (interstate) price discrimination among brewers and importers serving regional and national markets.

Argument.

The fundamental issue raised here is whether the Supreme Court's decision in *Joseph E. Seagram & Sons, Inc. v. Hostetter,*[1] approving the objectives of affirmation, remains good law after the decision in *Brown-Forman Distillers v. New York State Liquor Auth.*[2] Difficult and unsettled issues relating to this country's history and national economic policies are implicated by this question. These historic and economic concerns must be evaluated and resolved in the context of two competing and ill-defined constitutional provisions: the dormant (or implicit limitations of the) commerce clause and section two of the twenty-first amendment.

Given the increasingly national, if not international, character of business today, to some national and multinational business barons state boundaries in many respects may seem at best irrelevant and at worst impediments to commerce generating the greatest revenues and highest profit potential. This purely entrepreneurial view of economic integration suggests that the proliferation of fifty separate sovereign systems to regulate an article in commerce such as alcoholic beverages is somewhat "Goldbergian." From this perspective some also may be tempted to question why, in 1988, alcoholic beverages continue to be treated as a unique article in commerce.

History explains, if it does not justify, the present state of affairs. Alcoholic beverages have been treated as a unique item in commerce to be regulated by local and state governments since this country began. In fact, in many states, the availability of alcoholic beverages for resale is a hotly-debated moral and religious issue. Today,

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[1]384 U.S. 35, 85S.Ct. 1254, 16 L.Ed.2d 336 (1966).
[2]106S.Ct. 2080 (1986).

dire and also hotly-debated health care, social, cultural and political concerns about moderation in the consumption, advertising and marketing of alcoholic beverages vary in intensity, focus and approach from city to city, state to state and region to region in this country. As yet, there is no concensus about these concerns, except, perhaps, that alcoholic beverages remain a unique item in commerce and special rules for the industry marketing them must continue to be predicated on recognition of the localized historical, social, cultural and political diversity in the sovereign fifty states tolerated and guaranteed in this nation's federal system.

Recognizing the need for local control and regulation, the Supreme Court held, long before enactment of the Eighteenth Amendment, that states could regulate alcoholic beverages free of restraints imposed by the commerce clause.[3] Soon after the repeal of that amendment a number of states banded together and entered into the Des Moines warranty. Those states, known as monopoly states, distributed alcoholic beverages as wholesalers and often, as retailers. As part of their contract with suppliers, these states required that the suppliers warrant that the price offered was the lowest price anywhere in the country. This practice was adopted by the monopoly states to control price and eliminate price discriminations resulting from rebates, discounts and other price reductions given in the license state.[4] The remaining states, which could not muster the political support necessary to establish a monopoly, enacted regulatory systems that in-

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[3]*License Cases*, 5 U.S. (How) 504, 579, 12 L.Ed. 256 (1847); *Craig v. Boren*, 429 U.S. 190, 205-06, 97 S.Ct. 451, 50 L.Ed.2d 397 (1956).

[4]*See* de Gandahl, Trade Practice & Beverage Control in the Alcoholic Beverage Industry, LAW & CONTEMP. PROBLEMS 664, 667.

cluded price control and price discrimination provisions of some sort.[5].

While the monopoly states, which regulate every aspect of the distribution of alcoholic beverages, including contractual warranties with suppliers that are much more exacting than Connecticut's affirmation statute, are immune from commerce clause restraints as market participants,[6] the majority of license states do not enjoy such immunity. The issue presented here is then whether *Seagram* survives *Brown-Forman,* and, if this Court does in fact retreat from its opinion in *Seagram,* the direct impact of this Court's ruling upon the number of states that utilize affirmation to assure lower prices and prevent price discrimination.

Two courses present themselves in answering the fundamental question posed: the apparent distinctions between *Brown-Forman* and *Seagram* simply can be recited, or the answer may be pursued through the labayrinth of commerce clause and Twenty-First Amendment cases. While the latter course is not without difficulty, it nevertheless provides the more sound basis for resolving this case.

In a seminal article on the dormant commerce clause, recently relied upon by this court in upholding a state tender offer statute,[7] a method for analyzing state protec-

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[5]*Id.* at 680.

[6]*See White v. Massachusetts Council of Constructions Employers,* 406 U.S. 204, 206-07, 214-15, 103 S.Ct. 1043, 75 L.Ed.2d ____ (1983); *Reeves, Inc. v. Stake,* 447 U.S. 429, 438, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980); *Hughs v. Alexandra Scrap Corp.,* 426 U.S. 794, 806, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1970).

[7]*CTS Corp. v. Dynamics Corp. of America,* ____U.S. ____, 107 S.Ct. 1637, ____ L.Ed.2d ____ (1987).

tionism was both described and prescribed.[8] In that article, it was suggested that the focus of the clause—state protectionism—is the sole relevant inquiry; the clause is not a vehicle for evaluating the wisdom *vel non* of state legislation simply because it impacts on interstate commerce. In relying on the reasoning in this article, this court appears to have adopted the test prescribed.

Affirmation laws do not violate the commerce clause because they do not impermissibly discriminate against interstate commerce. Put another way, while the unique treatment of alcohol historically and constitutionally may have created a commercial system that is out of step with present views of interstate commerce held by some national and multi-national entrepreneurs, the impact of that system's affirmation laws on commerce is not an actionable one under the dormant commerce clause.

The commerce clause, which constitutes an express grant of power to Congress to regulate trade among the states, contains an implicit limitation on state actions affecting interstate commerce. *Cooley v. Board of Wardens,* 53 U.S. (12 How.) 299, 13 L.Ed. 996 (1851); *The Passenger Cases,* 48 U.S. (7 How.) 282, 12 L.Ed. 72 (1949). This implicit limitation is aimed at local laws that are protectionist, favoring local interests at the expense of those in other states. *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 26, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984); *City of Philadelphia v. New Jersey,* 337 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). Protectionism is prescribed because it is anathema to the concept of political union, it promotes retaliation, and it results in economic inefficiency. *See* Regan, *The Supreme Court and State Protec-*

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[8]Regan, *The Supreme Court and State Protectionism Making Sense of the Dormant Commerce Clause,* 84 MICH.L.REV. 1091 (1986).

tionism: Making Sense of the Dormant Commerce Clause, 84 MICH.L.REV. 1091, 1113-15 (1986) (hereafter *"Regan"*).

The provincialism proscribed by the commerce clause can take three forms: (1) legislation expressly referring to state lines; (2) legislation motivated by a protectionist purpose; and (3) legislation producing a protectionist effect. *Regan, supra,* at 1126 *et seq.* Apart from prohibiting outright legislation that on its face discriminates between in-state and out-of-state suppliers, the Court has recently announced that the commerce clause also prohibits states from extending their legislation beyond their borders so as to regulate extraterritorial transactions. *See Edgar v. MITE Corp.*, 457 U.S. 624, 642, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982). A state law that does not discriminate on its face or regulate extraterritorially may still have a discriminatory effect on interstate commerce. In such cases, this court has often stated that it must balance the nature of the local interest served and the degree to which it is served by the challenged regulation against the effects of that regulation on interstate commerce. *Arkansas Electric Corp. v. Arkansas Public Service Comm'n,* 461 U.S. 375, ____ S.Ct. ____, ____ L.Ed.2d ____ (1983); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).[9]

WSWA submits, however, that this court historically has, in fact, *not* engaged in balancing local interests against generalized claims of interstate injury. Further,

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[9]The process of balancing the respective interests has been seriously criticized as being at variance both with the scope of the protections of the dormant commerce clause and of the role of the federal judiciary in assessing state legislation. *See CTS Corp. v. Dynamics Corp. of America, supra,* 107 S.Ct. at 1652-53 (Scalia, J.) (concurring).

this court has recently adopted a narrower test under the dormant commerce clause. *See CTS Corp. v. Dynamics Corp. of America, supra,* 107 S.Ct. at 1652-53.

Since the affirmation statute here does not discriminate between in-state and out-of-state suppliers on its face or subject them to differing obligations, WSWA submits that under the more narrow test of *CTS,* the commerce clause inquiry is at an end. Alternatively, assuming that a *Pike* balancing is appropriate here, the Connecticut affirmation statute is clearly constitutional for the following reasons:

> I. Under the Twenty-First Amendment, Connecticut has greater authority to regulate alcoholic beverages free of constitutional restrictions than when regulating other types of commercial activity. *California v. La Rue,* 400 U.S. 109, 114, 93 S.Ct. 390, 34 L.Ed.2d 390 (1972); *United States v. Frankfort Distillers,* 324 U.S. 293, 299, 65 S.Ct. 661, 89 L.Ed. 951 (1945). See *California Retail Liquor Dealers v. MidCal,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980).
>
> II. This Court has expressly approved liquor regulation aimed at keeping prices low and curbing geographic price discrimination and doing so through legislation geared to pricing policies in other states. *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, 43, 86 S.Ct. 1254, 16 L.Ed.2d 336 (1966); *Brown-Forman Distillers v. New York State Liquor Authority, supra,* 106 S.Ct. at 2085. Preventing geographic price discrimination by regional and national brewers remains an apt and appropriate goal for Connecticut. See cases cited at *Amicus* Motion for Leave to file Brief at p. 4.

III. The objective of the Connecticut affirmation statute to maintain lower prices through the elimination of price discrimination closely parallels federal policy embodied in the Robinson-Patman Act, 15 U.S.C. ¶ 13(a).

IV. The mere existence of extraterritorial effects does not, by itself, establish a claim of discrimination against interstate commerce when the burden falls equally on in-state and out-of-state suppliers. *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 126, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978); *Minnesota v. Clover Leaf Creamery Co.,* 448 U.S. 456, 471-72, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981). See also *Northeast Bancorp, Inc. v. Board of Governors,* 105 S.Ct. 2545 (1985)(dicta supporting the principle certain extraterritorial effects and discriminations will be constitutionally tolerated in the face of particularized local concerns and needs).

V. There is no evidence that Connecticut's affirmation law *per se* has any extraterritorial economic impact nor has influenced *in any way* the extent to which brewers have actually raised prices or have refrained from lowering prices or offering volume discounts in New York, Massachusetts or anywhere else for that matter.[10]

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[10]It is important to note the facts relating to the structure and pricing practices of the beer industry relied upon by both the district court and the Court of Appeals were the parties' submissions in *United States Brewers Ass'n v. Healy,* 692 F.2d 275 (2 Cir. 1982) and are dated. The difficulties in assessing the factors today influencing prices in New York, for example, see Note, Vertical Restraints in the *Brewing Industry,* 50 Brooklyn L.R. 143, 148-153 (1983).

> VI. The evil to which the *Brown-Forman* decision was addressed was the extraterritorial effect of New York's statute in locking in pricing practices in other states and creating conflicting obligations on suppliers, and not a concern for unproven or hypothesized extraterritorial economic effects. *Brown-Forman Distillers v. New York State Liquor Authority, supra,* 106 S.Ct. at 2086, 2087, 2088 *cited with approval in CTS Corp. v. Dynamics Corp. of America, supra,* 107 S.Ct. at 1649.

In summary, Connecticut's affirmation statute is an unobtrusive, nondiscriminatory statute, aimed at a permissible and federally-sanctioned purpose. It does not burden interstate commerce but specifically frees the hands of suppliers to charge different prices in border states during the posting period.

Moreover, as alcoholic beverages remain an item to be uniquely treated even in the face of today's drive toward economic integration within this nation, within the continent and globally, so *Seagram's* guideline remains good, wise and constitutionally sound law, for it best and correctly embodies the premises of the Twenty-First Amendment recognized by Mr. Justice Frankfurter in his comment on the effect of the Twenty-First Amendment on guarantees otherwise provided by the Constitution in *United States v. Frankfort Distilleries, Inc.,* 324 U.S. 293, 300 (1945):

> The Twenty-First Amendment made a fundamental change, as to control of the liquor traffic, in the constitutional relations between the States and national authority. Before that Amendment—disregarding the interlude of the Eighteenth

> Amendment—alcohol was for constitutional purposes treated in the abstract as an article of commerce just like peanuts and potatoes. As a result, the power of the States to control the liquor traffic was subordinated to the right of free trade across state lines as embodied in the Commerce Clause. The Twenty-First Amendment reversed this legal situation by subordinating rights under the Commerce Clause to the power of a State to control effectively the traffic in liquor within its borders . . .

Conclusion.

For the above reasons, the decision of the Second Circuit should be reversed, and the cause remanded to the district court for action not inconsistent with this Court's opinion.

December 29, 1988

Respectfully submitted,

DOUGLAS W. METZ
Counsel of Record
Attorney for *Amicus Curiae* Wine and Spirits Wholesalers of America, Inc.

Nos. 88-449 and 88-513

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN F. HEALY, Et Al.,

Appellants,

—v.—

THE BEER INSTITUTE, Et Al.,

Appellees.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.,

Appellant.

—v.—

THE BEER INSTITUTE, Et Al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE COMMONWEALTH OF PENNSYLVANIA

MOREY M. MYERS
General Counsel
Counsel of Record
CHRISTOPHER A. LEWIS
Executive Deputy General Counsel
ERIC B. SCHNURER
Deputy General Counsel
CHERYL G. YOUNG
Chief Counsel,
Liquor Control Board

Office of General Counsel
17th Floor, 333 Market Street
Harrisburg, Pennsylvania 17101
(717) 783-6563

January 27, 1989

QUESTION PRESENTED

Whether all state "affirmation" requirements, which have the effect of fixing the price of alcoholic beverages in all other states and extra territorially regulate permissible prices in other states, thereby violate the Commerce Clause.

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INTEREST OF AMICUS[1]

Pennsylvania acts in its sovereign capacity both under the Twenty-first Amendment when it controls the purchase of liquor within its borders as the sole purchaser and as a distributor, and when it represents the interests of its citizens in a properly functioning inter-state and intra-state economy. Pennsylvania operates a liquor monopoly which purchases virtually all wine and distilled spirits sold in the Commonwealth. With purchases of $400 million dollars in 1987-88, the Commonwealth of Pennsylvania is the single largest purchaser of wine and distilled spirits in the United States. Pennsylvania is thus significantly

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[1] Consent to the filing of this brief has been obtained from counsel to the parties.

and uniquely harmed by defendants' actions, by being deprived of the normal advantages which large volume purchasers enjoy in an unfettered market and is further harmed by the restriction placed by affirmation on inter-brand competition in markets within its borders.

INTRODUCTORY STATEMENT

This Complaint presents a challenge to a Connecticut beer price affirmation statute. This is not a new issue for this Court -- twice before, the Court has been faced with challenges to affirmation statutes. Seagram v. Hostetter, 384 U.S. 35 (1966); Brown-Forman Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986). The Commonwealth of Pennsylvania believes that the affirmation statutes, regulations, and policies of the vast majority of States are violative of the commerce clause of the Constitution, and that a single, dispositive ruling by this Court is needed to resolve this issue.

Statute by statute rulings have not deterred the proliferation of affirmation statutes and practices, each designed to circumvent the latest ruling. And as the

Connecticut statute at issue here demonstrates. challenging such practices individually can become almost meaningless as states refine them sufficiently. Nonetheless, the interlocking, national network of such individual state laws unconstitutionally regulates interstate commerce. A decision of national scope, directed at not merely one state's statute, is both merited and needed.

STATEMENT OF FACTS

A. History of Price Affirmation

In 1933, by virtue of the passage of the Twenty-first Amendment to the United States Constitution, which repealed Prohibition, the States were granted broad regulatory power over the transportation, possession, delivery and use of alcoholic beverages within their borders. Seventeen states opted to control the distribution of liquor by operating wholesale liquor monopolies. Many of those states (including Pennsylvania) also have state-run retail liquor monopolies. These states are known as the "Control States." The remaining states, and the District of Columbia, chose to regulate distribution of liquor by licensing and regulating private wholesalers and retailers.

In 1938, representatives of thirteen of the seventeen Control States met in Des

Moines, Iowa to discuss common business problems. Liquor industry members also attended the meeting. At the time of that meeting, Virginia and some other attendees already had a provision in their standard liquor purchase contracts that required suppliers to affirm that the prices charged to the state were the lowest prices at which the suppliers sold their products anywhere in the United States.

The use of similar contract provisions by all Control States was openly discussed. Within several years, all Control States, including Pennsylvania (which was not a participant at the meeting), adopted affirmation provisions in their liquor purchase contracts. This type of provision is known in the liquor industry as the "Des Moines Warranty."

In 1964, the second phase in the development of the national price affirmation

system began. In that year, New York -- a non-control state with private wholesale and retail distributors -- passed a liquor affirmation statute requiring that all suppliers affirm to the state that the prices charged to wholesalers within the state were no greater than the lowest price charged nationally for any particular item in the preceding month. The act required that sellers post these prices and maintain them for thirty days. Violators of the act were subject to criminal and civil sanctions. Chapter 531, 1964 Session Laws of New York.

In the wake of this Court's decision, in Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966), not to invalidate the New York statute until it became operative and the actual workings of an affirmation statute and its effect on interstate commerce could be ascertained, most non-control states soon passed their own affirmation laws.

Presently, twenty non-control states ("the Affirmation Law States") have such laws or regulations. Although not in all detail identical, all affirmation laws require alcoholic beverage suppliers -- on their first sale into a state -- to charge to that state's private wholesalers a price no greater than the current lowest price offered anywhere in the United States for any particular item.

In 1972, this Court denied, without opinion, a motion for leave to file a complaint against twenty-six states who, at that time, had affirmation statutes, regulations or policies. Pennsylvania v. New York, 410 U.S. 978, reh den., 411 U.S. 977 (1973). That complaint sought to challenge only discrete portions of the national price affirmation system. Since then, this Court ha refined the state of the law with respect to t interplay between the Twenty-first

Amendment and the Commerce Clause, see Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), and affirmation has spread to other states, providing ample time to develop economic evidence on the adverse effects of affirmation on the free market system.

In 1985, this Court denied, without opinion, a motion for leave to file a complaint against thirty-seven states with affirmation statutes, regulations or policies. Pennsylvania v. Alabama, 472 U.S. 1015 (1985). Since that time, this Court has struck down New York's prospective affirmation statute. Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 106 S.Ct. 2080 (1986). At least one Justice indicated that, now that evidence of their effects exist, retrospective affirmation requirements should be struck down as

well, Hostetter notwithstanding. Id. at ___, 106 S.Ct. at 2088 (Blackmun, J., concurring).

The result of the Brown-Forman decision has been seriatim and conflicting litigation in individual district courts challenging individual statutes. Brown-Forman Corp. v. Tennessee Alcoholic Beverage Comm'n, No. 3-86-0926, slip op. (M.D. Tenn. June 30, 1987) (striking down statute), rev'd, No. 87-5870, slip op. (6th Cir. Nov. 4, 1988); Brown-Forman Corp. v. New Mexico Dept. of Alcoholic Beverage Control, 672 F.Supp. 1383 (D.N.M. 1987) (striking down statute); United States Brewers Ass'n v. Healy, 669 F.Supp. 543 (D. Conn. 1987) (upholding statute), rev'd, 849 F.2d 753 (2d Cir. 1988), probable jurisdiction noted, 57 U.S.L.W. 3347 (Nov. 14, 1988); Brown-Forman Corp. v. South Carolina Alcoholic Beverage Control Comm'n, 643 F.Supp. 943 (D.S.C. 1986) (striking down statute).

Pennsylvania believes that the time is now ripe for this Court to address the important constitutional questions inherent in the national price affirmation system and thereby avoid piece-meal and conflicting adjudications of this national question. It is essential, as well, that the Court's consideration of this matter embrace not just affirmation statutes, but all affirmation practices. While "affirmation laws are still being enforced or defended in court in seven license states," non-statutory affirmation practices "exist[] in contract requirements in eighteen control states." Healy II, Jurisdictional Statement of Appellants 14.

B. Effects of Price Affirmation

Three types of affirmation statutes and practices have sprung up -- prospective, retrospective, and contemporaneous. This Court has already declared the prospective

type to be unconstitutional, although such statutes remain in existence in at least seven states.

Affirmation provisions of any type make it impossible for distillers to respond to market pressures and set their prices in one state without forcing them to alter their pricing policies in other states. See Joseph E. Seagram & Sons v. Gazzara, 610 F. Supp. 673, 675 n.3. (S.D.N.Y. 1985), rev'd. per curiam, 800 F.2d 49 (2d Cir. 1986). This is just as true of retrospective requirements as it is of prospective ones.

Assume that a distiller sells Brand X both in New Mexico, a prospective state, and in Arizona, a retrospective state, during January. Assume further that the distiller desires to raise the price of Brand X in New Mexico on February 1. In order to satisfy New Mexico's requirement, the distiller would also have to raise the price it charges for

Brand X in Arizona on February 1, in order to insure that New Mexico's prospective statute is not violated by the sale of Brand X at a lower price in Arizona during February.

By raising the price in Arizona on February 1, however, the distiller finds itself in violation of Arizona's retrospective statute because the price to be charged in Arizona in February now exceeds the price that was in effect in New Mexico during January. The only alternative open to this distiller is to have determined in December that, in response to market conditions extant only in New Mexico, it would increase the price of Brand X across the nation on February 1. To comply with the retrospective statute in Arizona, the distiller would have had to have discontinued all sales of Brand X in Arizona (and any other retrospective state) during January. This effect of such statutes -- amounting to

a prohibition on sales in those states -- is certainly an excessive burden upon interstate commerce.

Were the facts reversed, so that the exigencies of competition demanded a price increase for Brand X in a retrospective state such as Arizona, the producer would be required to cease sales of Brand X in all other states for all of January before introducing its higher price in Arizona. In short, it is an excessive burden for producers to comply with prospective and retrospective statutes simultaneously.

Although contemporaneous statutes reduce these time-lag problems, they do not eliminate them. For one thing, given commercial realities it is clear that a "contemporaneous" affirmation requires more than that prices be the same in other states at the exact <u>instant</u> of (to use the Connecticut law) 10:00 o'clock a.m. on the sixth day of the

month. But even if contemporaneity can be said to occur only for one split second each month, prices in other states are still required to move according to the affirmation state's mandates for that instant, plainly a directly extraterritorial effect.

The actual effects of such requirements can be illustrated by the findings of fact in Brown-Forman Corp. v. South Carolina Alcoholic Beverage Control Comm'n, 643 F. Supp. 943 (D.S.C. 1986). There, the district Court found that the South Carolina price of Jack Daniel's Black Label "is at a level consistent with consumer demand," while, at the same price, "in Arizona Jack Daniel's Black Label is not competitive with other bourbons because it is overpriced." Id. at 947.

> Brown-Forman believes that Jack Daniel's Black Label is over-priced in Arizona, and therefore, exercising good business judgment, desires to lower its Arizona price for that product expecting to increase sales. However, to remain in

> compliance with South Carolina law, Brown-Forman may not lower its Arizona price for Jack Daniel's Black Label without concurrently lowering its South Carolina price for that product. Brown-Forman believes that its South Carolina price for Jack Daniel's Black Label is consistent with consumer demand and therefore, does not wish to lower its South Carolina price.

Id. at 947-48. Thus, as the district court concluded, "South Carolina's Affirmation Statute dictates the price Brown-Forman charges for Jack Daniel's Black Label in Arizona and keeps that price artificially high." Id. at 948 (emphasis added).

In fact, each state's price affirmation requirement has the effect of converting the maximum wholesale price in that state into the de facto minimum wholesale price in all states. Since thirty-eight states have virtually identical requirements, each state's maximum wholesale price becomes the actual wholesale price throughout the Country.

A price increase to a wholesaler in one state must be accompanied by an identical increase to all public and private wholesalers in the other thirty-seven states, under that state's affirmation policy. A price decrease to a wholesaler in one state must be accompanied by an identical decrease to all public and private wholesalers in the other thirty-seven states pursuant to the laws of these other states. Therefore, price decreases will occur in one local market only if it is economical for the distributor to reduce the price equivalently across the country, and, as the findings of the district court in South Carolina, for example, demonstrate, this is unlikely to be the case.

Ironically, the affirmation network thus frustrates its own object of lowering prices to purchasing states or consumers when a control state (or a contemporaneous affirmation state with a very large in-state

distributor) is involved. If the alcohol control agency in New Hampshire, a Control State, wished to negotiate down prices charged it by a distiller, affirmation would thwart the agency's objective. It would make sense economically for the agency to negotiate prices from a volume manufacturer, given the low costs of doing business inherent in the control (or large distributorship) context. However, the distiller will not be likely to comply with the agency's request, as to do so would place a potentially large economic burden upon its operations elsewhere.

Were the distiller to accept the lower price in New Hampshire, it would find itself in violation of other states' affirmation laws. Its action in New Hampshire would entail equivalent price reductions in every other affirmation and control state in which it does business, without regard to the

commercial realities in those states. Therefore, the distiller would not be likely to assent to a lower price in New Hampshire.

There are further problems caused by the network of conflicting affirmation practices, even when contemporaneous, reminiscent of the interstate truck and train cases. See Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978); Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761 (1945); South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938).

One such problem arises from the inconsistent treatment of distiller's posted prices and changes of those prices. Suppose that the distiller posts January prices of Brand X both in Minnesota, which permits mid-month price changes at will, and in Massachusetts, which requires "good cause shown" for any schedule amendments. If the

producer alters the price for Brand X in Minnesota, but cannot get regulatory approval in Massachusetts for the lower price, the distiller would be in violation of Massachusetts' affirmation provision since Brand X is now available more cheaply in Minnesota.

To remain in compliance with Massachusetts' statute, the distiller will have to refrain until the next month from lowering its price in Minnesota unless the liquor agency in Massachusetts, exercising its statutory discretion, permits the price reduction. In this scenario, Massachusetts' statute is unconstitutional. "The protections afforded by the Commerce Clause cannot be made to depend on the good grace of a state agency." Brown-Forman, 476 U.S. at ___ n.5, 106 S.Ct. at 2086 n.5.

The varying treatments accorded promotional allowances complicate the issue yet further. If a price reduction in Minnesota,

which allows any and all discounts for quantity, were considered a volume discount in other states, the distiller would be forced to reduce the price posted in all of those affirmation states that restrict discounts for quantity. This results in artificially low prices in those states which restrict or prohibit sales incentives. "By defining the 'effective price' of liquor differently from other States, [a State] can effectively force [a distiller] to abandon its promotional allowance program in States in which that program is legal, or force those other States to alter their own regulatory schemes" to conform. Brown-Forman, 476 U.S. at ___, 106 S.Ct. at 2087.

SUMMARY OF ARGUMENT

Despite this Court's invalidation of prospective affirmation requirements, they remain in a number of States, while a number of others have adopted other variants of affirmation. The reasoning of this Court's prior affirmation ruling is applicable to all types of affirmation requirements, however. Given the fact that any State choosing to abandon affirmation requirements would expose itself to the risk of significant economic harm, such affirmation requirements will persist in the absence of a definitive ruling invalidating all such requirements.

Such a ruling is merited in this case. Any type of affirmation requirement (1) acts on its own to dictate prices extraterritorially, and (2) acts in concert with affirmation requirement in other states

to regulate the price of alcoholic beverages throughout interstate commerce.

The plain purpose of affirmation requirements, moreover, is to attain a competitive advantage for a State's own consumers -- or the state itself, as a purchaser. Such a purpose is suspect under the commerce clause. It is fatal where, as here, this purpose is carried out by insisting that consumers in other States surrender whatever competitive advantages they possess.

As this Court noted in passing on a prospective statute in Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986), the affirmation practice is properly governed by the rule of Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935). In Baldwin, the Court struck down a requirement that distributors of milk in New York warrant that, if they purchased milk from producers outside New York, they would pay a

price no lower than the price charged by New York producers for similar milk.

The Baldwin Court ruled that one state may not project its legislation into another state by regulating the price to be paid in the other state for any product. Affirmation practices similarly require that a producer warrant that it will not charge a lower price than that charged in the regulating state, to any purchaser in any other state. This clearly regulates the price that may be paid in other states, an unconstitutional defect.

The effect of a network of such statutes, moreover, is to set a de facto minimum price throughout all affirmation states; since prices cannot, at whatever relevant time, be lower in any state in the nation without violating 37 other affirmation laws or contract provisions, prices cannot be set on a competitive basis reflecting true market forces in each state market. The potential

for -- and the reality of -- conflicting obligations under manifold state affirmation regimes further burdens the free market of interstate commerce guaranteed by the federal Constitution.

The States have demonstrated no willingness to abandon affirmation unless each and every State's affirmation practice is invalidated. Seriatim litigation in 37 district courts would be an unwieldy and uneconomical use of judicial resources. Given the incentives for each State, this issue will only be settled by a single, authoritative and dispositive ruling of this Court. This Court ought, therefore, to declare all alcoholic beverage price affirmation requirements to be unconstitutional.

ARGUMENT

I. THE PRICE AFFIRMATION SYSTEM UNCONSTITUTIONALLY BURDENS INTERSTATE COMMERCE.

In Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966), this Court ruled that it "need not now decide" whether a state affirmation requirement "could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the commerce clause." Id. at 42-43. The Court concluded by noting that "[a]lthough it is possible that specific applications . . . may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise." Id. at 52.

Twenty years later, in Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986), the Court was faced with the specific applications of the

successor statute to the very one challenged in Seagram. There, the Court declared, "We agree . . . that a 'prospective' statute such as Connecticut's beer affirmation statute, or New York's liquor affirmation statute, regulates out-of-state transactions in violation of the Commerce Clause." 476 U.S. at ___, 106 S.Ct. at 2086.

Despite this ruling, prospective affirmation requirements remain in force in at least seven states, while "retrospective" or "contemporaneous" affirmation requirements exist in an additional 12 states. Eighteen other states impose affirmation requirements through contractual clauses demanded by the state-run liquor monopoly. It is clear that states will not voluntarily cease enactment and application of affirmation requirements individually, but will only do so as the result of an authoritative and encompassing single decision of this Court striking down

the nationwide crazy-quilt of affirmation requirements.

As the decision in Brown-Forman is applicable to all prospective affirmation practices, all prospective affirmation requirements ought to be declared invalid once and for all, rather than requiring piecemeal, seriatim litigation over each such statute. Pennsylvania believes, however, that the reasoning in Brown-Forman properly applies to all retrospective and contemporaneous affirmation requirements as well. As the facts demonstrate, any type of affirmation statute acts both (1) individually to dictate prices extraterritorially, and (2) in concert with other such state statutes to regulate the price of alcohol throughout interstate commerce. There is simply no distinction of constitutional magnitude among affirmation requirements. They all must fail.

The clear touchstone for decision in this case is Brown-Forman. There this Court recognized, citing Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 528 (1935), that "[w]hile a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they possess." Brown-Forman, 476 U.S. at ___, 106 S.Ct. at 2084.

In Baldwin, the Court invalidated a New York "equal price" milk statute similar to liquor affirmation provisions. The New York statute in Baldwin required distributors selling milk in New York to warrant that, if they purchased milk from producers outside New York, they would pay a price no lower than the price charged by New York producers for similar milk. 294 U.S. at 520. This Court struck down the statute as a direct restraint on interstate commerce, id. at

521-22, 525-26, 528, declaring that "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." Id. at 521.

As the Brown-Forman Court observed, "Justice Cardozo's opinion for the Court [in Seelig] recognized that a State may not 'establish a wage scale or a scale of prices for use in other states, and . . . bar the sale of the products . . . unless the scale has been observed.'" Brown-Forman, 476 U.S. at ___, 106 S.Ct. at 2085 (quoting Seelig, 294 U.S. at 528). Thus, the Court noted in Brown-Forman that "[t]he mere fact that the effects of New York's [affirmation statute] are triggered only by sales of liquor within the State of New York therefore does not validate the law if it regulates the out-of-state transactions of distillers who sell in-state." Id. The question, then, was

"whether New York's affirmation law regulates commerce in other States." Id.

This Court concluded that, like the statute in Baldwin, it did. "That the [Affirmation] Law is addressed only to sales of liquor in New York is irrelevant if the 'practical effect' of the law is to control liquor prices in other States." Id. at ___, 106 S.Ct. at 2086 (citing Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 775 (1945)). See also Healy I, supra, 692 F.2d 275, 279 (2d Cir. 1982) ("Thus, it has been held repeatedly that where the practical effect of a state regulation is to control conduct in other states, the regulation violates the Commerce Clause.") (citing Edgar v. MITE Corp., 457 U.S. 624, 642 (1982); Southern Pacific, supra; Seelig, supra; Shafer v. Farmers Grain Co., 268 U.S. 189, 199 (1925); New York, Lake Erie & W. RR

v. Pennsylvania, 153 U.S. 628, 646 (1894)), summarily aff'd, 464 U.S. 909 (1983).

The Court found that the "practical effect" of the New York affirmation provision was, indeed, to control liquor prices in other states. The reasoning in Brown-Forman is directly applicable to all affirmation statutes, regulations, policies and practices.

On their face, affirmation requirements key prices in the regulating state to prices in other states in such a way as to regulate directly out-of-state prices in precisely the same way as the statute struck down in Baldwin, supra. Affirmation requirements simply are not internally directed -- they are extraterritorial. By requiring that distributors warrant that they will not sell alcohol in Pennsylvania (or anywhere else) at a lower price than that in the regulating state, the regulating state clearly

"project[s] its legislation into [Pennsylvania] by regulating the price to be paid in that state for [alcohol] acquired there." See Baldwin, 294 U.S. at 521.

As the Baldwin Court stated, "commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another." Id. at 524. Any affirmation requirement clearly involves just such regulation, barring access to a state's market unless a producer refrains from price reductions in other states. Thus, for example, the court in Brown-Forman Corp. v. South Carolina Alcoholic Beverage Control Comm'n, 643 F. Supp. 943 (D.S.C. 1986), found as fact that "South Carolina's Affirmation Statute dictates the price Brown-Forman charges for Jack Daniel's Black Label in Arizona and keeps that price artificially high." Id. at 948.

On a practical basis, the affirmation system -- regardless of the form of any specific state's requirement -- compels sellers to offer their products to all wholesalers at the same price in all thirty-eight states. Each state's price affirmation requirement has the effect of converting the maximum wholesale price in that state into the de facto minimum wholesale price in all states. A price increase to a wholesaler in one state must be accompanied by an identical increase to all public and private wholesalers in the other thirty-seven states pursuant to that state's affirmation requirement. A price decrease must be accompanied by an identical decrease to all public and private wholesalers in the other thirty-seven states pursuant to the requirements of these other states; therefore, price decreases will occur in one local market only if it is economical for the distributor to

reduce the price equivalently across the country.

Affirmation provisions make it impossible, in short, for distillers to respond to market pressures and set their prices in one state without forcing them to alter their pricing policies in other states. See Joseph E. Seagram & Sons v. Gazzara, 610 F. Supp. 673, 675 n.3. (S.D.N.Y. 1985), rev'd. per curiam, 800 F.2d 49 (2d Cir. 1986). In setting a sales price for its product in Pennsylvania, any interstate supplier must price that product with the certain knowledge that it has no choice but to offer the same price in each Defendant State. Thus, each Defendant State's affirmation policy -- whether retrospective, prospective, or contemporaneous -- requires that an interstate supplier slavishly adhere to market conditions existing in all Defendant States as a factor in setting its Pennsylvania

price. The uniform price then offered to wholesalers nationally bears no direct relationship to the price which any given wholesaler, such as the Pennsylvania Liquor Control Board, would otherwise pay.

Affirmation is a system which in operation merely insures that all wholesale customers receive a uniform price, not a competitive price. When each Defendant State individually controls the lowest price which a supplier may charge Pennsylvania, by tying that price to the price offered by the supplier to its smallest private wholesale customer in any of the thirty-eight states, irrespective of actual cost factors, the concept of a single national market place, unimpeded by insular state regulation, is defeated. The cumulative effect of all affirmation requirement is unlawfully to burden interstate commerce because of the extraterritorial impact on supplier pricing

decisions in transactions occurring wholly beyond the regulating state's borders. This direct extraterritorial regulation of commerce is barred by the Commerce Clause.

The Court observed in Brown-Forman that "the proliferation of state affirmation laws following this Court's decision in Seagram has greatly multiplied the likelihood that a seller will be subjected to inconsistent obligations in different States." 476 U.S. at ___, 106 S.Ct. at 2087. Thus, as Justice Blackmun asserted,

> Seagram is now a relic of the past. It was decided when affirmation statutes were comparatively new and long before the proliferation of overlapping and potentially conflicting affirmation statutes that has taken place in the last two decades. I see no principled distinction that can be drawn for constitutional analysis between New York's current prospective statute and the same State's retroactive statute upheld in Seagram. . . .

Id. at ___, 196 S.Ct. at 2088 (Blackmun, J., concurring).

The Court counseled in Brown-Forman that "[i]f there is a conflict between today's decision and the Seagram decision," as Justice Blackmun asserted there was, "there will be time enough to address that conflict should a case arise involving a retrospective statute." Id. at ___ n.6, 106 S.Ct. at 2087 n.6. The time to address that issue is here. In the two years since Brown-Forman, it has become apparent that despite the clear ruling of this Court, states with prospective statutes will not abandon them unless forced to do so individually by litigation -- let alone those states with retrospective or contemporaneous requirements. In the meantime, Pennsylvania and consumers in states across the country are being forced to pay hundreds of millions of dollars each year that they should not have to, because lower prices are effectively proscribed in their

states by operation of price regulatory schemes enacted by other states.

This system regulates commerce nationally. Yet it is wholly the product of state laws and requirements with extraterritorial effect. The requirements are instituted in order to obtain a competitive advantage for in-state consumers. These requirements thus have all the badges of incompatibility with the commerce clause. See, e.g., Edgar v. MITE Corp., 457 U.S. 624, 640-43 (1982) (plurality op.); Philadelphia v. New Jersey, 437 U.S. 617 (1978). The network of conflicting affirmation practices, even when contemporaneous, renders the nature of state-by-state affirmation requirements further suspect as unduly burdensome on interstate commerce in a fashion reminiscent of the interstate truck and train cases. See Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); Raymond Motor

Transportation, Inc. v. Rice, 434 U.S. 429 (1978); Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761 (1945); South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938).

Pennsylvania's inability to obtain volume discounts and other trade considerations -- which it could obtain in a free market -- solely because of the operation of the laws and policies of other states has required the Commonwealth to pay hundreds of millions of dollars more for its purchases since the decision in Seagram.

Some states argue in defense of affirmation that it is properly designed to protect their consumers against the great buying power of large private wholesalers and large-state liquor monopolies being used to obtain just such volume discounts at the expense of everyone else. They argue that Pennsylvania's ability to exert its true

market power to obtain lower prices would necessarily result in higher prices to other customers; they assert, moreover, that allowing a large-state liquor monopoly to exert monopsony power in this way is in effect no different from what it is achieved through affirmation practices, forcing liquor distributors to give a state's own consumers the lowest possible price.

But there is a clear difference. An affirmation law bars access to a state's market unless a producer refrains from price reductions in other states; it mandates that a liquor producer cannot offer its product for sale in another state below a certain price. Using market power to obtain the lowest price one can possibly obtain, however, is not the same as mandating that the seller cannot sell below that price to anyone else -- using market power in this way, in fact, is what happens in the free market

every day. The fact that smaller buyers than Pennsylvania are unlikely to be able to drive a better bargain than Pennsylvania is not the same as saying that Pennsylvania forbids better deals in other states at pain of losing all legal right to sell in Pennsylvania.

The latter clearly violates the commerce clause, all the more so as it is undertaken for the explicit purpose of securing commercial advantages to the enacting state's consumers. See Edgar v. MITE Corp., 457 U.S. 624, 640-43 (1982) (plurality op.); Philadelphia v. New Jersey, 437 U.S. 617 (1978).

In sum, there is no justification for the continuance of the affirmation system. Many states recognize this, but cannot afford to let go of the affirmation system themselves unless all other states do so as well, anymore than the proverbial hunter can afford

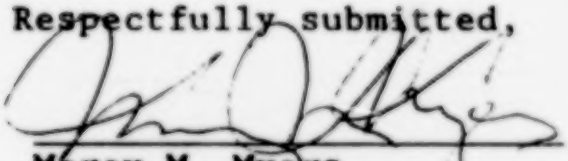
to let go of the wolf that he has by the ears.

Pennsylvania therefore asks this Court to resolve state failure to remedy this constitutional violation despite the decision in Brown-Forman, by issuing a definitive ruling in this case declaring price affirmation requirements unconstitutional.

CONCLUSION

For the foregoing reasons, this Court ought properly declare all alcoholic beverage price affirmation requirements to be unconstitutional, and affirm the judgment of the court below.

Respectfully submitted,



Morey M. Myers
General Counsel
Counsel of Record

Christopher A. Lewis
Executive Deputy General Counsel

Eric B. Schnurer
Deputy General Counsel

Cheryl G. Young
Chief Counsel
Liquor Control Board

OFFICE OF GENERAL COUNSEL
17th FLOOR, 333 MARKET STREET
HARRISBURG, PENNSYLVANIA 17101
(717)783-6563

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IN THE

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OCTOBER TERM, 1988

JOHN F. HEALY, *et al.*,
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On Appeal from the United States Court of Appeals for the Second Circuit

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BRIEF OF THE DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLEES

ARNOLD M. LERMAN
LOUIS R. COHEN
Counsel of Record
MITCHELL LAZARUS
TERESA D. BAER

WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Attorneys for Amicus Curiae The Distilled Spirits Council of the United States, Inc.

January 31, 1989

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BRIEF OF THE DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INTEREST OF THE AMICUS CURIAE

The Distilled Spirits Council of the United States, Inc. ("DISCUS"), a Delaware non-profit corporation, is the principal trade association of the producers and im-

porters of distilled spirits products in the United States. The members of DISCUS produce or import approximately 85% of the distilled spirits products sold in the United States. DISCUS members include both national and regional suppliers, and the members ship distilled spirits to customers throughout the country. The particular Connecticut price affirmation statute whose constitutionality is at issue in this case does not cover distilled spirits, but distilled spirits are subject to affirmation statutes in Connecticut and other states. The legal principles established by the Court's decision in this case will bear upon the constitutionality of those statutes. The affirmation statutes interfere with interstate commerce in distilled spirits products, and the members of DISCUS have a vital interest in removing the burdens on interstate commerce that those statutes impose.[1]

SUMMARY OF ARGUMENT

The beer price affirmation provisions of the Connecticut Liquor Control Act require brewers and importers of beer (a) to post on the sixth of each month the per-unit prices they will charge Connecticut wholesalers in the following month, and (b) to certify in writing that these prices are no higher than the lowest prices they are charging on posting day anywhere in the bordering states of Massachusetts, New York, and Rhode Island.[2] This scheme violates the Commerce Clause for two reasons: first, its intended effect is to raise beer prices in the bordering states in order to offset competitive advantages enjoyed by those states; second, the scheme could not be

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[1] Written consent to the filing of this brief amicus curiae has been obtained from the parties to this case. Copies of the consent letters accompany this brief.

[2] CONN. GEN. STAT. ANN. § 30-63b(b) (West Supp. 1988). We construe the statute in accordance with the Declaratory Ruling of the Connecticut Department of Liquor Control purporting to eliminate the express prohibition on reducing out-of-state prices after posting in Connecticut.

copied by other states without imposing palpably intolerable burdens on commerce. The scheme is not saved by the Twenty-first Amendment; to the contrary, the scheme deeply offends the fundamental principle that each state should have substantial autonomy in internally regulating the sale, transportation, and distribution of alcoholic beverages.

1. The Court held long ago that no state may "project its legislation into [other states] by regulating the price to be paid" for goods in those states.[3] More recently, in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, the Court held that this rule directly barred a state liquor price affirmation statute that on its face only capped prices in the enacting state, but whose "'practical effect' . . . is to control liquor prices in other States."[4] The Connecticut scheme is not distinguishable in any relevant respect from the New York statute invalidated in *Brown-Forman*.

Connecticut concedes that the scheme was adopted because "the retail price of beer has generally been higher in Connecticut than in the bordering states."[5] Connecticut has consistently claimed that its purpose was simply "to lower the price of beer in Connecticut,"[6] but the statutory lever plainly works both ways. An earlier version of the Connecticut scheme, differing only in that the supplier was required to certify that its posted prices did not exceed border state prices in the covered month (rather than on posting day), was invalidated in *United States Brewers Association v. Healy* ("*Healy I*"), because "the obvious effect . . . is to control the minimum price that may be charged [in bordering-state transactions]."[7]

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[3] *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935).

[4] 476 U.S. 573, 583 (1986).

[5] Conn. J.S. 7.

[6] *Id.* at 8.

[7] 692 F.2d 275, 282 (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983).

The present scheme has the same "obvious effect." For example, a Massachusetts statute requires beer prices in that state to be posted and maintained for a calendar month.[8] Therefore, the prices a supplier wishes to charge in Connecticut in February must be charged in Massachusetts throughout January, the prices he wishes to charge in Connecticut in March must be charged in Massachusetts throughout February, and so forth. It is the Connecticut statute, not the purely in-state Massachusetts requirement for beer, that links prices in the two states. Connecticut seeks to distinguish its present scheme from the Connecticut scheme condemned in *Healy I* and the similar New York scheme condemned in *Brown-Forman* on the ground that the required linkage between Massachusetts and Connecticut prices is not simultaneous. But what *Healy I* and *Brown-Forman* condemned was not *identity* of prices in different states on a given day but the fact that one state's rules continuously dictated permissible price levels elsewhere; that vice is equally present here.

2. Instead of prescribing in-state regulation, the Connecticut statute dictates the *relationship* between beer prices in Connecticut and past beer prices in bordering states. When one state seeks to legislate the relationship between transactions in two or more states, a new question naturally arises: what would happen if the legislatures of other states copied the first?[9] If the answer is

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[8] MASS. ANN. LAWS ch. 138, § 25B(d) (Law. Co-op. 1981). Massachusetts has a further statute applicable to alcoholic beverages other than malt beverages that requires suppliers to affirm that their price to Massachusetts wholesalers "is not higher than the lowest price at which such item of alcoholic beverage will be sold by such brand owner . . . to any wholesaler anywhere in any other state . . . at any time during the calendar month for which [the posted price] shall be in effect . . . ." MASS. ANN. LAWS ch. 138, § 25D(a) (Law. Co-op. 1981).

[9] The Court has in the past asked this kind of question to test state statutes that prescribe or affect interstate relationships. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S.

that such replication would produce a plainly intolerable obstruction of commerce, all such state statutes, including the first, are invalid. And where there is every reason to believe that other states would in fact quickly copy the first, invalidation must be swift.

The Connecticut scheme violates this rule. If even one bordering state adopted the Connecticut scheme, there would be a two-state gridlock: prices charged by multistate beer suppliers in each state would be capped by past prices in the other, creating a permanent ceiling that would also be a permanent floor because any reduction would forever lower the ceiling. Adoption of the Connecticut scheme by a few additional states would spread the gridlock nationwide, trapping not only all multistate suppliers but also every state bordering any Connecticut-scheme state: such a bordering state could not choose to leave beer prices to market forces, because prices in that state would be driven to the levels established in the Connecticut-scheme states. The spread of the Connecticut scheme forces uniform pricing throughout the nation and upon individual states that wish to determine their own regulatory goals.

3. The Twenty-first Amendment does not save, but condemns the Connecticut statute. The Court squarely

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617, 629 (1978); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 773 (1945); *Public Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 90 (1927), *overruled on other grounds, Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983); *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557, 572 (1886). In the context of state taxation of interstate commerce, the Court has referred to the rule as one of "internal consistency." *See, e.g., Goldberg v. Sweet*, 57 U.S.L.W. 4070, 4072 (U.S. Jan. 10, 1989) ("To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result."); *American Trucking Ass'ns v. Scheiner*, 107 S. Ct. 2829, 2840 (1987); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

held in *Brown-Forman* that, while "[t]hat Amendment gives the States wide latitude to regulate the importation and distribution of liquor within their territories," [10] it "confers no authority to control sales [of liquor] in other States. The Commerce Clause operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption [elsewhere]." [11] Moreover, the Connecticut statute, like the statute condemned in *Brown-Forman*, "may interfere with the ability of other States to exercise their own authority under the Twenty-first Amendment . . . [by forcing] other States either to abandon regulatory goals or to deprive their citizens of the opportunity to purchase brands of liquor that are sold in [the enacting state]." [12]

ARGUMENT

I. THE CONNECTICUT SCHEME VIOLATES THE COMMERCE CLAUSE BECAUSE OF ITS INTENDED EFFECT ON BEER PRICES IN OTHER STATES.

A. The Connecticut Scheme Is Intended To Raise Beer Prices in the Bordering States in Order To Offset Competitive Advantages Enjoyed by Those States.

The Connecticut statute requires each beer supplier to post on the sixth of each month the per-unit prices it will charge to wholesalers in the state in the following month, and then to adhere to the posted prices.[13] The statute also requires the supplier to certify under oath that its posted prices are no higher than the lowest prices at which it is then (on posting day) selling in the

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[10] 476 U.S. at 584.

[11] *Id.* at 585.

[12] *Id.*

[13] CONN. GEN. STAT. ANN. § 30-63c(b) (West Supp. 1988); 17 CONN. AGENCIES REGS., LIQUOR CONT. § 30-6-B4(a) (1985).

bordering states of Massachusetts, New York, and Rhode Island.[14]

The conceded purpose of this scheme is to equalize the typically higher prices in Connecticut and the lower prices in the bordering states. Connecticut has acknowledged in this Court that, "[h]istorically, the retail price of beer has been generally higher in Connecticut than in the bordering states . . . ." [15] Connecticut contends that the "purpose of the law was [merely] to lower the price of beer in Connecticut" [16] and not to raise prices elsewhere, but the statutory lever plainly works both ways, raising prices in the bordering states.[17]

Indeed, an earlier version of the Connecticut scheme was invalidated under the Commerce Clause for just this reason. In 1981, Connecticut adopted a statute much like the present one, except that the brewer was required to certify that its posted prices were no higher than the

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[14] CONN. GEN. STAT. ANN. § 30-63b(b) (West Supp. 1988).

[15] Conn. J.S. 7.

[16] *Id.* at 8.

[17] In *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 43 (1966) ("*Seagram*"), on a facial challenge to a novel affirmation statute before it had gone into effect, the Court said that the "discriminatory effects" alleged in that case were then "largely matters of conjecture." Whatever the continuing validity of the decision in that case, *see Brown-Forman*, 476 U.S. at 584 n.6; *id.* at 586 (Blackmun, J., concurring), the fact that the Connecticut scheme *must* raise prices in the bordering states is not a matter of speculation. It follows directly from Connecticut's concession that the typical prices in Connecticut tend to be higher than in the bordering states, together with the assumption that a beer supplier will seek to maximize its profits. Such a supplier, forced to a single set of prices, will set them based on aggregate demand in an area that includes the bordering states *and* Connecticut, and they necessarily will be higher than prices based on demand in each bordering state alone. The point is well explained in Pustay & Zardkoohi, *An Economic Analysis of Liquor Price Affirmation Laws: Do They Burden Interstate Commerce?*, 48 LA. L. REV. 649 (1988).

lowest prices at which it *would* sell in bordering states during the month the posted prices were in effect in Connecticut. The 1981 version of the scheme was challenged in *United States Brewers Association v. Healy* (*"Healy I"*),[18] and struck down by the court of appeals on the ground that it was "evident that the Connecticut statute seeks to regulate prices not just in Connecticut but in its surrounding states as well," and "plain" that the statute had an "extraterritorial thrust."[19] This Court summarily affirmed.[20]

Connecticut claims to have remedied this defect, but the extraterritorial thrust of the revised version is as plain and just as unconstitutional. The present Connecticut statute differs from the former version in only two respects: (a) there is only one day, rather than a month, during which the beer supplier is formally required to raise or hold prices in the bordering states up to the level it wishes to charge in Connecticut; and (b) the one-day period comes ahead of, rather than simultaneously with, the period during which the posted prices must be adhered to in Connecticut. Neither of these relieves the scheme of its "extraterritorial thrust."

First, Connecticut counts, as the court below noted, on the statutes in Massachusetts and New York to broaden the impact of the Connecticut scheme. Massachusetts requires beer suppliers to post prices in advance and keep them in effect throughout a calendar month.[21] New York provides that any price that has been decreased may not then be increased for 180 days.[22] To use the Massachusetts statute as an example, the

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[18] 692 F.2d 275 (2d Cir. 1982).

[19] *Id.* at 282.

[20] *Healy v. United States Brewers Ass'n*, 464 U.S. 909 (1983).

[21] *See* MASS. ANN. LAWS ch. 138, § 25B(d) (Law. Co-op. 1981).

[22] N.Y. ALCO. BEV. CONT. LAW § 55-b2 (McKinney 1987).

combined effect of the Connecticut statute and the Massachusetts statute is that the prices a beer supplier wishes to charge in Connecticut in February must be charged in Massachusetts throughout January; the March Connecticut prices must be charged in Massachusetts throughout February, and so forth.[23]

Connecticut argues that the direct effect of its scheme is only to raise prices in bordering states on one day, and that any broader effect in bordering states is the fault of the statutes adopted in those states, for which Connecticut is not to blame.[24] But the Massachusetts and New York statutes relating to beer deal only with prices within those states. It is Connecticut alone that forges the links between states. The citizens and the legislatures in Massachusetts and New York have not chosen the higher beer prices Connecticut is imposing on them.

Second, it is immaterial to the "extraterritorial thrust" that the link Connecticut has forged is between month 1 in Massachusetts and month 2 in Connecticut. The scheme condemned in *Healy I* was unconstitutional *not* because beer prices would always be identical in Connecticut and the bordering states, but because compliance with Connecticut's rules would continuously drive suppliers to charge higher prices in the bordering states than they would otherwise choose. That is equally the case under the revised scheme: beer suppliers obviously do not set Massachusetts prices without looking ahead to Connecticut's requirements. While it is possible in any given month for a supplier to have lower prices in Massachusetts than in Connecticut, Connecticut penalizes

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[23] Connecticut's assertion in this Court, *see, e.g.*, Brief of Appellants John F. Healy, *et al.* at 12, 13, 22, that the supplier is nevertheless free to reduce his *Massachusetts* prices in any given month is an attempt at sleight-of-hand: the penalty for doing so is lower Connecticut prices throughout the following month because Massachusetts requires the price to be held for one month.

[24] *See, e.g., id.* at 9, 13.

that choice by forcing a reduction in Connecticut the following month.[25]

In sum, the revised Connecticut scheme, like the old one, deters low prices and price reductions in bordering states by demanding a monetary benefit for Connecticut residents in exchange for the "privilege" of charging low prices on sales in bordering states. The plain objective of the scheme remains the reduction of competitive pressures by "control[ling] the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a state outside of Connecticut." [26]

B. A Scheme That Penalizes Low Beer Prices in Other States by Exacting a Monetary Benefit for a State's Own Residents Violates the Commerce Clause.

The Commerce Clause [27] forbids extraterritorial regulation of prices. As long ago as 1894, in invalidating an attempt by Pennsylvania to regulate payments made by a railroad in New York, the Court emphasized that "[n]o principle [was] better settled than that the power of a State, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction." [28] In *Baldwin v. G.A.F. Seelig, Inc.*,[29] the Court

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[25] The Connecticut statute also intentionally penalizes promotional discounts and other forms of interbrand price competition in bordering states. The Connecticut statute specifically provides that in determining prices in the bordering states "appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever." CONN. GEN. STAT. ANN. § 30-63c(b) (West Supp. 1988). By virtue of the Connecticut scheme alone, a supplier must avoid having any promotional discount (even one applicable to a few qualified purchasers or locations in the bordering state) in effect in any bordering state on the day Connecticut has chosen as posting day, on pain of the promotional price's becoming the regular price for a whole month in Connecticut.

[26] *Healy I*, 692 F.2d at 282.

[27] U.S. CONST. Art. I, § 8, cl. 2.

[28] *New York, Lake Erie & W. R.R. v. Pennsylvania*, 153 U.S. 628, 646 (1894).

[29] 294 U.S. 511 (1935).

made it clear that this principle forbids regulation of in-state transactions that is designed to control out-of-state prices. The Commerce Clause principles set forth in *Seelig* bar the present Connecticut scheme, as they barred the version adopted in 1981.

In *Seelig*, New York attempted, by barring certain transactions from taking place in New York, to dictate the minimum price at which a New York milk dealer could buy milk in Vermont from a dairy located in Vermont. Justice Cardozo, writing for a unanimous Court, recognized that the purpose of the statute was "the creation of a parity of prices between New York and other states."[30] Such a statute was impermissible because "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there."[31] The Court explained that "commerce . . . is burdened unduly when one state regulates by indirection the prices to be paid to producers in another . . . ."[32]

The *Seelig* principle has been consistently applied and reaffirmed in modern cases, including cases involving alcoholic beverage price affirmation statutes. Indeed, it was the basis for the invalidation of the 1981 version of the present Connecticut scheme. In *Healy I*, the statute at issue required each brewer to "file a sworn affirmation that its posted per-unit prices will be no higher than its prices for the corresponding units sold in any state bordering Connecticut during the month covered by the

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[30] *Id.* at 524.

[31] *Id.* at 521.

[32] *Id.* at 524; *see also id.* at 528 ("In licensing or prohibiting the sale of intoxicating liquors a state does not attempt to neutralize economic advantages belonging to the place of origin. . . . It is a very different thing to establish . . . a scale of prices for use in other states . . . .").

posting." [33] The Second Circuit, finding it "evident that the Connecticut statute seeks to regulate prices not just in Connecticut but in its surrounding states as well," [34] invalidated the statute, and this Court summarily affirmed.[35]

The Court again relied on *Seelig* in *Brown-Forman Distillers Corp. v. New York State Liquor Authority.*[36] In *Brown-Forman*, the Court struck down a New York statute that required liquor producers to affirm that their prices to in-state wholesalers were no higher than the lowest prices charged to wholesalers anywhere else in the country during the same month. The Court concluded that the "practical effect" of the law was "to control liquor prices in other States" [37] and declared it invalid.

The Connecticut statute at issue here is not distinguishable from the statutes invalidated in *Seelig*, *Healy I*, and *Brown-Forman*. Connecticut has conceded that beer prices would normally be lower in the bordering states than in Connecticut, and the state admits that the purpose of the scheme is to eliminate that difference, so as to protect Connecticut wholesalers from bordering state competition.[38] Connecticut does this by penalizing, in Connecticut transactions, any reduction of prices in bordering states.

The Court condemned exactly this in *Brown-Forman*:

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[33] 692 F.2d at 277 (footnote omitted).

[34] *Id.* at 282.

[35] *Healy v. United States Brewers Ass'n*, 464 U.S. 909 (1983).

[36] 476 U.S. 573, 580, 582-83 (1986).

[37] *Id.* at 583.

[38] Brief of Appellants John F. Healy, *et al.* at 6-7, 19.

> While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess. . . . Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States.[39]

The Connecticut scheme, which seeks to protect both Connecticut consumers and Connecticut vendors by forcing Connecticut prices down while forcing bordering state prices up, is the same sort of "economic protectionism."

II. THE CONNECTICUT SCHEME VIOLATES THE COMMERCE CLAUSE BECAUSE REPLICATION OF THE SCHEME IN OTHER STATES WOULD LEAD TO A PLAINLY INTOLERABLE OBSTRUCTION OF COMMERCE.

A. A State Statute That, on Its Face, Seeks To Dictate Interstate Price Relationships Should Be Tested for "Internal Consistency."

The Connecticut scheme seeks, on its face, "to regulate beer prices *in reference to* the regulated prices in the border states."[40] Its purpose is to dictate, not merely prices or price ceilings in Connecticut, but the relationship between prices in Connecticut and those in Massachusetts, New York, and Rhode Island. We assume *arguendo* that this alone "is not sufficient to invalidate the statute."[41] But the fact that Connecticut is, indisputably, not simply minding its own business but attempting to forge a link with prices in other states naturally gives

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[39] 476 U.S. at 580 (citations omitted); *see also New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (for New Hampshire "to gain an economic advantage at the expense of New England Power's customers in neighboring states" is " 'simple economic protectionism' ")).

[40] Conn. J.S. App. 9A (emphasis in the court's opinion).

[41] *Seagram*, 384 U.S. at 43.

rise to a further question: what would happen if other states copied the Connecticut statute? We suggest that if the answer is that there would then be a plainly intolerable burden on commerce (or, indeed, on the Twenty-first Amendment prerogatives of the remaining states to choose their own regulatory goals), then all such statutes, including the first, are invalid.

The Court has applied such a rule in the past, invalidating state regulations in a variety of situations after examining the consequences if other states were to imitate the first.[42] In the area of state taxation of activities in interstate commerce, the Court has articulated the rule as one of "internal consistency": "To be internally consistent, a tax must be structured so that if every State were to impose an identical tax no multiple taxation would result." [43]

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[42] *E.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 773 (1945); *Public Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 90 (1927) ("[I]f Rhode Island could place a direct burden upon the interstate business of the Narragansett Company because this would result in indirect benefit to the customers of the Narragansett Company in Rhode Island, Massachusetts could, by parity of reasoning, reduce the rates on such interstate business in order to benefit the customers of the Attleboro Company in that State, who would have, in the aggregate, an interest in the interstate rate correlative to that of the customers of the Narragansett Company in Rhode Island."), *overruled on other grounds, Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983); *Wabash, St. Louis & Pac. Ry. v. Illinois*, 118 U.S. 557, 572 (1886) ("[I]f each one of the States through whose territories these goods are transported can fix its own rules for prices . . . and all the other incidents of transportation to which the word 'regulation' can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to.").

[43] *Goldberg v. Sweet*, 57 U.S.L.W. 4070, 4072 (U.S. Jan. 10, 1989); *see American Trucking Ass'ns v. Scheiner*, 107 S. Ct. 2829, 2840 (1987); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

This is a case where copycat statutes are not a mere theoretical possibility. As we argue in more detail below, there are compelling reasons for price linkage statutes to spread and historical evidence that they will do so. The Commerce Clause and the Twenty-first Amendment together set bounds on any one state's regulation of multistate suppliers of alcoholic beverages. The Court can test whether Connecticut has overstepped those bounds by examining what would happen if other states were to copy the Connecticut scheme.

There is an obvious illustration of why such a test is needed. Suppose Connecticut modified its scheme, only slightly, to provide that in-state beer prices must be a penny a case *lower* than past prices in bordering states. Such a statute, if it stood alone, would hardly differ in its impact from the present Connecticut scheme, and Connecticut could defend it with all the arguments she makes in this case: that the scheme directly regulates only transactions occurring in Connecticut, that suppliers are free to modify their prices in bordering states, etc. But the Court would surely invalidate the scheme on "internal consistency" grounds: it could not be copied by even one other linked state because only one state could have the lowest price. As we explain below, the consequences of replication of the Connecticut scheme are as extreme.[44]

B. The Connecticut Scheme Fails the "Internal Consistency" Test.

The Connecticut scheme woefully fails the proposed test, and it does so in part because of a feature that Connecticut deems one of its virtues: the linkage between Connecticut prices and *past* prices in other states. If

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[44] We also point out below, *see* pp. 17-18 *infra*, that small differences in methods of computation between Connecticut and a bordering state that seeks to copy the Connecticut scheme would create the same sort of stymie as an explicit call in each state for lower prices than in its neighbors.

other states were to copy this linkage, the result would be rigid gridlocks, trapping both multistate suppliers and other states.

To begin with, if even one bordering state (say, New York) copied the Connecticut scheme, prices charged by multistate suppliers in both states would become virtually immoveable forever: unless a beer supplier declined to sell in one of the states for an entire month, the maximum prices in each state would be capped by previous prices in the other state. Moreover, the maximum prices would almost surely be the minimum prices as well, because any reduction in either state would permanently lower the ceiling in both. Except by staying out of one of the states, a multistate beer supplier could not lower prices to meet competition, nor could it ever raise prices to cover increased costs.

This mere two-state gridlock would also trap other states. Suppose, for example, that after New York copies Connecticut, some other state bordering either Connecticut or New York—say, Rhode Island—chose to leave beer prices unregulated (as Rhode Island has), on the assumption that market forces would produce the lowest prices for its consumers. Prices charged by multistate suppliers in Rhode Island would nevertheless never fall below (although they could be above) the linked prices in Connecticut and New York, because any lower price would permanently reduce the Connecticut-New York ceiling. The Rhode Island legislature, realizing this, would be compelled to imitate its neighbors to protect its beer sellers and its citizens from price variations that could only go one way.[45]

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[45] There is a page of history to go with this logic. In 1966, when the Court decided *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966) (*"Seagram"*), the New York price affirmation statute challenged in that case was a novel one, paralleled in only one other state. *See* KAN. STAT. ANN. § 41-1112 (1961). The Court rejected the challenge saying, "[i]t will be time enough to assess the alleged extraterritorial effects of § 9 when a case arises that clearly pre-

If a larger number of states adopted the Connecticut statute, the result would approach a permanent nationwide gridlock. No beer price charged by a multistate supplier in a Connecticut-scheme state could ever be raised (because every price in every Connecticut-scheme state would be determined by reference to a past price in a different place), and no such price would ever be lowered because this would cause the nationwide ceiling to ratchet down. Prices in non-Connecticut-scheme states would be forced to be at least as high as in the Connecticut-scheme states and could be higher. Even the option of achieving a price adjustment by strategically staying out of one or a few states in one month would ultimately become impractical.

The picture gets even worse if one assumes that the states' regulatory schemes might *not* be quite identical but that, for example, the method of computing a permissible price might vary somewhat from state to state. That is, of course, a more realistic assumption: the computation of prices and the designation of the units to which they apply are both matters of some complexity, and beer price-control statutes have often varied in their definitions or have left the matter to regulatory agencies.[46] If, for example, New York required all "prices" to be determined net of certain taxes, while Connecticut required all "prices" to be determined net of certain delivery costs, the two statutes, each purporting to require

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sents them." *Seagram*, 384 U.S. at 42-43. By the time the *Brown-Forman* case reached the Court in 1986, twenty other states had decided that, if New York could demand the lowest prices in the country, so could they, and had parroted (with variations) the New York statute. *Brown-Forman*, 476 U.S. at 576. The minimum prices charged in any state had become the maximum prices chargeable in much of the nation.

[46] *See, e.g.*, N.Y. ALCO. BEV. CONT. LAW § 55-b3b (McKinney 1987).

only that in-state prices be "no higher than" bordering state prices, might in practice each require that prices in the enacting state be lower than in the other.

At the time of *Brown-Forman*, the maze of price-affirmation statutes [47] meant that, notwithstanding the local-option philosophy that underlies the Twenty-first Amendment, for any supplier of alcoholic beverages doing a multistate business, pricing was done for covered products on a national basis and was a matter of enormous complexity. Multistate replication now of the Connecticut scheme would be even worse, because prices would be linked not only from state to state but to the past as well. The consequences for both interstate commerce and state regulatory discretion are plainly intolerable, and the Connecticut scheme should be declared invalid under the Commerce Clause for that reason.

III. THE TWENTY-FIRST AMENDMENT DOES NOT SAVE THE CONNECTICUT SCHEME; IT PROVIDES A FURTHER REASON FOR CONDEMNING IT.

A. *Brown-Forman* Establishes That the Twenty-first Amendment Does Not Give Any State the Right To Impose Its Policies on Its Neighbors.

The Twenty-first Amendment prohibits the "transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof. . . ." [48] The Court has consistently recognized the authority this gives the states to regulate imports and internal traffic in alcohol: "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants

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[47] *See* n.45 *supra*.

[48] U.S. CONST. Amend. XXI, § 2.

destined for use, distribution, or consumption within its borders." [49]

But when the Twenty-first Amendment was invoked in defense of the price affirmation statute involved in *Brown-Forman*, as it is here, the Court gave that contention short shrift:

> [The Twenty-first Amendment] gives New York only the authority to control sales of liquor in New York, and confers no authority to control sales in other States. The Commerce Clause operates with *full force* whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in a foreign country, or another State.[50]

Indeed, the Court has regularly rejected the argument that the Twenty-first Amendment entitles a state to reach conduct beyond its borders.[51]

B. The Connecticut Scheme Is Fundamentally Inconsistent With the Twenty-first Amendment, Because It Intrudes Upon *Other* States' Prerogatives To Set Alcoholic Beverage Policies.

The Chief Justice recently observed, in another context, that "the bounds of [the Twenty-first Amendment] have escaped precise definition." [52] One thing surely beyond dispute, however, is that a principal purpose of the

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[49] *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964).

[50] *Brown-Forman*, 476 U.S. at 585 (emphasis added; citation omitted).

[51] *See, e.g., Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 333-34 (1964); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938); *see also Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715-16 (1984).

[52] *South Dakota v. Dole*, 107 S. Ct. 2793, 2795 (1987).

Amendment was to protect states from interference by other states in their internal liquor policies. The Connecticut scheme is exactly such interference.

The history of the Amendment is familiar. Section 2 of the Twenty-first Amendment incorporated into the Constitution the substance of two pre-Prohibition statutes: the Wilson Act of 1890 [53] and the Webb-Kenyon Act of 1913.[54] Both were intended in part to prevent the rules and practices in some states from being imposed on other states.[55] Supporters of the Webb-Kenyon Act—whose language formed the prototype for Section 2 of the Twenty-first Amendment [56]—emphasized that its purpose was to provide each state with the power to regulate within its own borders, but not to regulate in other states. As Representative Henry stated to the applause of the House: "Today we appeal to you to maintain the integrity of State laws, State governments, and the right of legal self-government, *to let the people of every State control the liquor traffic as they see proper.*" [57]

The Court has long recognized that the Twenty-first Amendment protects states against, *inter alia*, each

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[53] 27 U.S.C. § 121 (1982).

[54] 27 U.S.C. § 122 (1982).

[55] The Wilson Act made liquor subject to the laws of each state "upon arrival" in that state. The Webb-Kenyon Act prohibited the importation of liquor intended for use in violation of the laws of the receiving state.

[56] "The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes." *Craig v. Boren*, 429 U.S. 190, 205-06 (1976); *see* 76 CONG. REC. 4141 (1933) (remarks of Sen. Blaine); *id.* at 4227-28 (remarks of Sen. Bingham).

[57] 49 CONG. REC. 2787 (1913) (remarks of Rep. Henry) (emphasis in original). Of course, as the Court has recognized, the power of a state to regulate internally is not absolute. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 108 (1980); *Craig v. Boren*, 429 U.S. 190, 204-09 (1976); *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939) (per curiam).

other. In *Carter v. Virginia*,[58] the Court examined a Virginia law intended to prevent diversion of alcoholic beverage shipments, supposedly moving through that state, into illicit channels in Virginia.[59] The Court upheld the law because "[b]y [Virginia's] ruling she has imposed no substantial clog on whatever cognate rights her sister states may have to determine their own policies regarding intoxicating liquors and to receive alcoholic beverages in interstate commerce, if they so desire." [60] Justice Frankfurter noted in concurrence: "State control must yield to superior federal power, but State control by one State, since the Twenty-first Amendment, need not yield to State control by another State." [61]

Similarly, in *Brown-Forman*, after ruling that the extraterritorial effects of New York's price affirmation law "dispose[d] of the Twenty-first Amendment issue," [62] the Court provided a further reason for ruling against the state:

> New York's affirmation law may interfere with the ability of other States to exercise their own authority under the Twenty-first Amendment. . . . [New York law], therefore, may force other States either to abandon regulatory goals or to deprive their citizens of the opportunity to purchase brands of liquor that are sold in New York. New York's reliance on the Twenty-first Amendment is therefore misplaced.[63]

There is, in sum, considerable irony in Connecticut's invocation of the Twenty-first Amendment in this case.

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[58] 321 U.S. 131 (1944).

[59] *Id.* at 135.

[60] *Id.* at 138.

[61] *Id.* at 141.

[62] *Brown-Forman*, 476 U.S. at 585.

[63] *Id.*

The Connecticut scheme forces prices higher in neighboring states, penalizes the beer-price policies of Massachusetts and New York, defeats the objective of Rhode Island to allow beer prices to be determined by market forces, and threatens (if the Connecticut scheme is copied elsewhere) to create a national gridlock in which *no* state has effective power to regulate prices within its borders and price policy is uniform nationwide. That, to say the least, is not what the draftsmen of the Twenty-first Amendment intended.

CONCLUSION

The decision of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

ARNOLD M. LERMAN
LOUIS R. COHEN
Counsel of Record
MITCHELL LAZARUS
TERESA D. BAER

WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Attorneys for Amicus Curiae
The Distilled Spirits Council
of the United States, Inc.

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In The
Supreme Court Of The United States

OCTOBER TERM, 1988

JOHN F. HEALY, et al.,
Appellants,

v.

THE BEER INSTITUTE, et al.,
Appellees.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.,
Intervenor-Appellants,

v.

THE BEER INSTITUTE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT AND SUPPLEMENTAL BRIEF FOR THE APPELLANTS JOHN F. HEALY, et al. WITH APPENDIX

CLARINE NARDI RIDDLE
ACTING ATTORNEY GENERAL
ROBERT F. VACCHELLI
Assistant Attorney General
Counsel of Record

RICHARD M. SHERIDAN
Assistant Attorney General
MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
Telephone: (203) 566-7570

25pp

Nos. 88-449, 88-513

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

JOHN F. HEALY, et al.,
Appellants,

v.

THE BEER INSTITUTE, et al.,
Appellees.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.,
Intervenor-Appellants,

v.

THE BEER INSTITUTE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF APPELLANTS JOHN F. HEALY, et al., FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT

Pursuant to the Rules of the Supreme Court of the United States, the Appellants John F. Healy, et al., by and through their undersigned counsel, respectfully move for leave to file the accompanying supplemental brief after oral argument.

The reasons supporting this motion are as follows:

Oral argument in these consolidated appeals was heard on March 28, 1989, and at that time the Court asked several questions concerning the existence of Connecticut brewers. At that time the undersigned Counsel of Record represented to the Court that there were no Connecticut brewers. That representation was correct at the time, however certain events have occurred in Connecticut since which could change those facts in the near future. The supplemental brief brings those facts to the Court's attention pursuant to Counsel's continuing duty to inform the Court of changes in circumstances which may be material to the case.

For the foregoing reasons, the Appellants respectfully request leave to file the accompanying brief.

Respectfully submitted,

JOHN F. HEALY, et al.

CLARINE NARDI RIDDLE
ACTING ATTORNEY GENERAL

ROBERT F. VACCHELLI
Assistant Attorney General
Counsel of Record

RICHARD M. SHERIDAN
Assistant Attorney General

MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
Telephone: (203) 566-7570

April 26, 1989

Nos. 88-449, 88-513

In The
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OCTOBER TERM, 1988

JOHN F. HEALY, et al.,
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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE APPELLANTS JOHN F. HEALY, et al. WITH APPENDIX

CLARINE NARDI RIDDLE
ACTING ATTORNEY GENERAL
ROBERT F. VACCHELLI
Assistant Attorney General
Counsel of Record

RICHARD M. SHERIDAN
Assistant Attorney General
MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
Telephone: (203) 566-7570

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARGUMENT

Oral argument in these consolidated appeals was heard on March 28, 1989, and at that time the Court asked several questions concerning the existence of Connecticut brewers. At that time the undersigned Counsel of Record represented to the Court that there were no Connecticut brewers. That representation was correct at the time, and it is still accurate. However, certain events have occurred in Connecticut since which could change the facts in the near future.

First, on April 10, 1989, the New Haven Brewing Company, Inc. filed an application with the Connecticut Department of Liquor Control for a manufacturer permit for beer. *See* Application; App. A. The application is in the process of being reviewed for compliance with the Liquor Control Act. If approved, the applicant would be permitted to manufacture and sell beer to wholesalers within Connecticut and in other states. Conn. Gen. Stat. § 30-16(1),(2).[1] Whether the applicant will sell only in Connecticut, or in other states as well, will be its decision.

Second, on March 30, 1989, the General Law Committee of the Connecticut General Assembly gave a favorable report on a proposed bill creating a new type of permit termed a "Brew Pub." *See* Comm. Bill No. 6301, Conn. Gen. Assem., Jan. Sess. 1989; App. B. The bill was also approved by the Finance, Revenue and Bonding Committee on April 18, 1989 and it could be presented to the State House of Representatives and Senate for vote this Session. If the bill is passed by both houses of the legislature and signed into law by the Governor in its present form, it would allow the manufacture

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[1] Conn. Gen. Stat. § 30-16(1),(2) provides as follows:

(1) A manufacturer permit shall allow the manufacture of alcoholic liquor and the storage, bottling and wholesale distribution and sale of alcoholic liquor manufactured or bottled to permittees in this state and without the state as may be permitted by law; but no such permit shall be granted unless the place or the plan of the place of manufacture has received the approval of the department of liquor control. A holder of a manufacturer permit may apply for and shall receive an out-of-state shipper's permit for manufacturing plants and warehouse locations outside the state owned by such manufacturer or a subsidiary corporation thereof, at least eighty-five per cent of the voting stock of which is owned by such manufacturer, to bring into any of its plants or warehouses in the state alcoholic liquors for reprocessing, repackaging, reshipment or sale either (a) within the state to wholesaler permittees not owned or controlled by such manufacturer or (b) outside the state.

(2) A manufacturer permit for beer only shall be in all respects the same as a manufacturer permit, except that the scope of operations of the holder shall be limited to beer, but shall permit the storage of beer in any part of the state.

and sale of beer to consumers for consumption on the premises of such a facility. Under this bill, a brew pub is a tavern permitted to manufacture its own beer for sale to its patrons. It is not authorized to sell beer to other wholesalers or retailers.

Neither a brew pub licensee, nor a brewer who chooses to sell only in Connecticut, would be required to affirm its prices.

This Supplemental Brief is filed pursuant to Counsel's continuing duty to inform the Court of changes in circumstances which may be material to the case, and to avoid misleading representations.

CONCLUSION

In all other respects, the Appellants rely on the positions stated in their briefs already on file with the Court.

Respectfully submitted,

JOHN F. HEALY, et al.

CLARINE NARDI RIDDLE
ACTING ATTORNEY GENERAL

ROBERT F. VACCHELLI
Assistant Attorney General
Counsel of Record

RICHARD M. SHERIDAN
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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

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A. Application for Manufacturer Permit for Beer only: New Haven Brewing Company, Inc. 1A

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APPENDIX A

APPLICATION FOR LIQUOR PERMIT
State of Connecticut
Department of Liquor Control
State Office Building
Hartford, Conn. 06106

A. Enter here the type of permit desired—MB-1001 Manufacturer of Beer

DATE APPLICATION RECEIVED—APR 10 1989 Department of Liquor Control

AMOUNT OF FEE RECEIVED—900

DATE FEE RECEIVED—4/10/89

RECEIPT NO.—D2096

B. PLACE OF BUSINESS **Telephone No. 772-2739**

1. ADDRESS AT WHICH BUSINESS WILL BE CONDUCTED—458 Grand Avenue, New Haven, CT 06513

2. PRESENT TRADE NAME OF BUSINESS, IF ANY—New Haven Brewing Company, Inc.

3. NAME OF BUILDING OWNER—KAM Realty

4. TERM OF LEASE IF APPLICANT IS LESSEE—5 years

a. EXPIRATION DATE—March 3, 1994

5. Is any part of this building used for a dwelling, lodging house, or sleeping quarters?—NO

7. DESCRIBE HERE HOW IT IS CLOSED OFF—Not applicable.

8. Is there now a permit on the proposed premises?—NO

10. FIRE MARSHALL APPROVAL

b. SIGNATURE OF MARSHALL—Not applicable.

11. CERTIFICATE OF ZONING AUTHORITY: This is to certify that the building in item 1 of this section is located in the town or city there stated; that I am acquainted with the zoning ordinances and bylaws of said town or city; and that, at this location, said town or city does not prohibit the sale of alcoholic liquor under the type of permit here applied for. Signature must be less than 30 days.

a. NAME OF TOWN OR CITY—New Haven

b. NAME OF ZONING AUTHORITY—New Haven Zoning Administrator

c. DATE—4/3/89

d. SIGNATURE OF AUTHORIZED OFFICER—/s/ Francesco Gargiulo

e. TITLE—Zoning Administrator

12. CERTIFICATE OF TOWN CLERK

b. DATE—4/3/89

c. NAME OF TOWN OR CITY—New Haven

d. SIGNATURE OF TOWN OR CITY CLERK—/s/ Helen E. Fuller

C. FOR APPLICANT ONLY (Permittee)
HOME Telephone No. 562-2244

1. NAME OF APPLICANT—Potts, Alan Blair

2. OTHER HOME ADDRESSES DURING PAST 5 YEARS—
   1) 30 Cranston Street, New Haven, CT
   2) 511 Orange Ave., New Haven, CT
   3) 55 Warren Street, New Haven, CT
   4) 265 College Street, New Haven, CT

3. DATE OF BIRTH—4/16/1962

4. SEX—M

5. MARITAL STATUS—Married

6. PRESENT HOME ADDRESS—489 Edgewood Ave., New Haven, CT 06511

7. Are you the sole owner of the business to be conducted under this permit?—NO

D. TYPE OF BACKER Check one only. If club, check either Corporation or Unincorporated Association.—CORPORATION

F. FOR BACKER IF CORPORATION OR UNINCORPORATED ASSOCIATION

1. NAME OF CORPORATION OR ASSOCIATION—New Haven Brewing Company, Inc.

2. STATE WHERE ORGANIZED—Connecticut

3. DATE OF ORGANIZATION—January 6, 1988

4. FULL HOME-OFFICE ADDRESS—458 Grand Avenue, New Haven, CT 06513

5. Officers, Directors and Shareholders

b. NAME—SS#—See Exhibit 'A'

c. HOME ADDRESS—See Exhibit 'A'

d. NUMBER OF SHARES—See Exhibit 'A'

6. Shareholders and Date of Birth

a. NAME—SS#—See Exhibit 'A'

b. DATE OF BIRTH—See Exhibit 'A'

c. NUMBER OF SHARES—See Exhibit 'A'

G. FOR APPLICANT, BACKERS (Including Corporations or Unincorporated Association) AND IMMEDIATE FAMILIES OF APPLICANT AND BACKERS.

1. LIQUOR PERMITS HELD NOW OR PREVIOUSLY

a. By applicant and/or individual backers.—None.

b. By corporation or officers or directors of corporation.—None.

2. PREVIOUS LIQUOR PERMITS REFUSED, REVOKED, FORFEITED, OR SUSPENDED.—None

3. ALL ARRESTS, INCLUDING MOTOR VEHICLES FOLLOWED BY A CONVICTION.—None

4. PUBLIC OFFICES NOW HELD.—None

5. LOANS OR CREDITS RECEIVED FROM MANUFACTURERS OR WHOLESALERS OF ALCOHOLIC LIQUORS.—None.

H. CLUBS—Not applicable.

I. RESTAURANTS

1. OPERATING FIGURES FOR (MONTH & YEAR)—N/A

2. RECEIPTS—N/A

3. EXPENDITURES—N/A

J. APPOINTMENT OF APPLICANT AS PRINCIPAL REPRESENTATIVE (if applicant is not to be sole owner)

By signature on this application, the backers of proposed applicant agree to appoint him as principal representative on the premises where the sale of alcoholic liquor is to be permitted and to vest in him the same full authority and control of these premises and of the conduct of all business therein relative to the sale of alcoholic liquor as said backers could in any way have and exercise; and the applicant agrees to accept such authority and control.

K. SIGNATURES This application must be signed and sworn to by the applicant and all backers. If backer is a corporation or an unincorporated association, application must be signed and sworn to by an authorized agent. If permittee is sole backer—permittee must sign lines 1 & 2.

1. APPLICANT (Permittee)—/s/ A. Blair Potts
A. Blair Potts

6. BACKER—/s/ A. Blair Potts
A. Blair Potts, President
New Haven Brewing Company, Inc.

L. DATE OF APPLICATION—March 31, 1989

M. JURATS

1. FOR APPLICANT PERSONALLY APPEARED the above-named A. Blair Potts, and made oath to the truth of the statements contained in his answers to the foregoing questions.

State of Connecticut, County of Hartford

SS.—Hartford

NOTARIZED BY—/s/ Florence A. Dickson
FLORENCE A. DICKSON
NOTARY PUBLIC
MY COMMISSION EXPIRES
MARCH 31, 1991

3. FOR BACKER (Corporation or Unincorporated Association) County Clerk's Certificate must be attached if jurat is taken outside of Connecticut PERSONALLY APPEARED the above-named A. Blair Potts and made oath that he is the President of New Haven Brewing Company, Inc. and is duly authorized to sign in behalf of said organization; that the seal affixed below is the seal of said organization; that the statements contained in his answers to the foregoing questions are true.

Hartford, Connecticut April 3, 1989

NOTARIZED BY—/s/ Florence A. Dickson
FLORENCE A. DICKSON
NOTARY PUBLIC
MY COMMISSION EXPIRES
MARCH 31, 1991

APPENDIX B

STATE OF CONNECTICUT

Committee Bill No. 6301 Page 1

Committee Bill No. 6301 Page PPPL

Referred to Committee on GENERAL LAW

LCO No. 5411

Introduced by (GL)

General Assembly
January Session, A.D., 1989

AN ACT PERMITTING CERTAIN ESTABLISHMENTS TO MANUFACTURE AND SELL BEER FOR ON-PREMISES CONSUMPTION.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 30-1 of the general statutes is amended by adding subdivision (38) as follows:

(NEW) (38) "Brew pub" means a place where beer is manufactured and sold for on-premises consumption.

Sec. 2. Subsection (a) of section 30-15 of the general statutes is repealed and the following is substituted in lieu thereof:

(a) Permits shall be subject to the regulations of the department of liquor control and the provisions of this chapter and shall be of the following classes:

(1) Airline permit;

(2) Boat permit;

(3) Broker's permit;

(4) Cafe permit;

(5) Charitable organization permit;

(6) (A) Club permit or (B) nonprofit club permit;

(7) Coliseum permit;

(8) Coliseum concession permit;

(9) Concession permit;

(10) Druggist permit;

(11) Golf country club permit;

(12) (A) Hotel permit or (B) hotel permit for beer only;

(13) (A) Manufacturer permit or (B) manufacturer permit for apple brandy or (C) manufacturer permit for cider or (D) manufacturer permit for beer only or (E) manufacturer permit for farm winery OR (F) MANUFACTURER PERMIT FOR BREW PUB;

(14) Military permit;

(15) Nonprofit public art museum permit;

(16) Nonprofit theater permit;

(17) Out-of-state shipper's permit for alcoholic liquors;

(18) Out-of-state shipper's permit for beer only;

(19) (A) Package store permit or (B) grocery store beer permit;

(20) Railroad permit;

(21) Resort permit;

(22) (A) Restaurant permit, (B) restaurant permit for beer only, (C) restaurant permit for wine and beer only or (D) restaurant permit for catering establishment;

(23) (A) Special sporting facility bar permit or (B) special sporting facility concession permit or (C) special sporting facility employee recreational permit or (D) special sporting facility guest permit or (E) special sporting facility restaurant permit;

(24) Tavern permit;

(25) Temporary permit for beer only;

(26) (A) University permit, or (B) university liquor permit;

(27) (A) Warehouse bottling permit or (B) warehouse storage permit;

(28) (A) Wholesaler permit or (B) wholesaler permit for beer only;

(29) (A) Bowling establishment permit or (B) bowling establishment permit for beer only or (C) racquetball facility permit;

(30) (A) Special outing facility permit or (B) special outing facility permit for beer only;

(31) Nonprofit public television corporation permit;

(32) (A) Airport restaurant permit, (B) airport bar permit or (C) airport airline club permit;

(33) Nonprofit golf tournament permit.

Sec. 3. Section 30-16 of the general statutes is repealed and the following is substituted in lieu thereof:

(1) A manufacturer permit shall allow the manufacture of alcoholic liquor and the storage, bottling and wholesale distribution and sale of alcoholic liquor manufactured or bottled to permittees in this state and without the state as may be permitted by law; but no such permit shall be granted unless the place or the plan of the place of manufacture has received the approval of the department of liquor control. A holder of a manufacturer permit may apply for and shall receive an out-of-state shipper's permit for manufacturing plants and warehouse locations outside the state owned by such manufacturer or a subsidiary corporation thereof, at least eighty-five per cent of the voting stock of which is owned by such manufacturer, to bring into any of its plants or warehouses in the state alcoholic liquors for reprocessing, repackaging, reshipment or sale either (a) within the state to wholesaler permittees not owned or controlled by such manufacturer or (b) outside the state.

(2) A manufacturer permit for beer only shall be in all respects the same as a manufacturer permit, except that the scope of operations of the holder shall be limited to beer, but shall permit the storage of beer in any part of the state.

(3) A manufacturer permit for cider not exceeding six per cent alcohol by volume shall allow the manufacture, storage, bottling and wholesale distribution and sale of such cider to permittees and nonpermittees in this state as may be permitted by law; but no such permit shall be granted unless the place or the plan of the place of manufacture has received the approval of the department.

(4) A manufacturer permit for apple brandy shall be in all respects the same as a manufacturer permit, except that the scope of operations of the holder shall be limited to apple brandy.

(5) A manufacturer permit for a farm winery shall be in all respects the same as a manufacturer permit, except that the scope of operations of the holder shall be limited to wine. Such permit shall also authorize the sale in bulk by the holder thereof from the premises where the products are manufactured pursuant to such permit and shall authorize the holder thereof to sell from such premises to a retailer wine manufactured by the farm winery permittee in the original sealed containers of not more than fifteen gallons per container and to sell or deliver such wine to persons outside the state. Such permit shall also authorize the offering and tasting of free samples of wine to visitors and prospective retail customers for consumption on the premises of the farm winery permittee and the selling at retail from the premises sealed bottles or other sealed containers of wine for consumption off the premises, provided a town may, by ordinance or zoning regulation, prohibit any such offering, tasting or selling at retail at premises within such town for which a manufacturer permit for farm winery has been issued. No licensed farm winery shall sell any wine not manufactured in such winery. The farm winery permittee shall produce within the state an average crop of fruit equal to not less than fifty-one per cent of the fruit used in the manufacture of the farm winery permittee's wine. An average crop shall be defined each year as the average yield of the farm winery permittee's two largest annual crops out of the preceding five years, except that

during the first seven years from the date of issuance of a farm winery permit, an average crop shall be defined as three tons of grapes for each acre of vineyard farmed by the farm winery permittee. A holder of a manufactured permit, except a manufacturer permit for cider, may apply for and shall receive a wholesaler permit.

(6) A MANUFACTURER PERMIT FOR A BREW PUB SHALL ALLOW THE MANUFACTURE, STORAGE, BOTTLING AND RETAIL SALE OF BEER TO BE CONSUMED ON THE PREMISES WITH OR WITHOUT THE SALE OF FOOD.

Sec. 4. Subsection (a) of section 30-41 of the general statutes is repealed and the following is substituted in lieu thereof:

(a) The fees per annum for permits under this chapter shall be as follows:

(1) Airline permit, four hundred dollars;
(2) Boat permit, four hundred dollars;
(3) Broker's permit, one hundred sixty dollars;
(4) Cafe permit, seventeen hundred fifty dollars;
(5) Charitable organization permit, twenty-five dollars;
(6) (A) Club permit, two hundred forty dollars, (B) nonprofit club permit, six hundred fifty dollars;
(7) Coliseum permit, two thousand dollars;
(8) Coliseum concession permit, one thousand dollars;
(9) Concession permit for the period of one year, two hundred forty dollars; for a period of six months, one hundred sixty dollars and for one day, twenty-five dollars;
(10) Druggist permit, four hundred dollars;
(11) Golf country club permit, eight hundred dollars;
(12) Hotel permit, (A) in towns having a population according to the last-preceding United States census of ten thousand or less, twelve hundred dollars, (B) in all other towns having a population of fifty thousand or less, sixteen hundred dollars, and (C) in all other towns, twenty-four hundred dollars, (D) hotel permit for beer only, two hundred forty dollars;

(13) (A) Manufacturer permit, sixteen hundred dollars, (B) manufacturer permit for apple brandy, three hundred twenty dollars, (C) manufacturer permit for cider, one hundred sixty dollars, (D) manufacturer permit for beer only, eight hundred dollars, (E) manufacturer permit for farm winery, two hundred forty dollars, (F) MANUFACTURER PERMIT FOR BREW PUB, TWO HUNDRED FORTY DOLLARS;

(14) Military permit, fifteen dollars;

(15) Nonprofit public art museum permit, two hundred dollars;

(16) Nonprofit theater permit, two hundred dollars;

(17) A Connecticut manufacturer or wholesaler holding an out-of-state shipper's permit for alcoholic liquor or for beer only, forty-five dollars; any other person holding an out-of-state shipper's permit for alcoholic liquors or for beer only, one thousand dollars;

(18) (A) Package store permit, four hundred dollars, (B) grocery store beer permit, eighty dollars;

(19) Railroad permit, four hundred dollars;

(20) Resort permit, twelve hundred dollars;

(21) (A) Restaurant permit, twelve hundred dollars, (B) restaurant permit for beer only, two hundred forty dollars, (C) restaurant permit for wine and beer only, five hundred sixty dollars, (D) restaurant permit for catering establishment, twelve hundred dollars;

(22) (A) Special sporting facility bar permit, three hundred dollars, (B) special sporting facility concession permit, two hundred forty dollars, (C) special sporting facility employee recreational permit, two hundred forty dollars, (D) special sporting facility guest permit, two hundred forty dollars, and (E) special sporting facility restaurant permit, twelve hundred dollars;

(23) Tavern permit, two hundred forty dollars;

(24) Temporary permit for (A) alcoholic liquor, twenty-five dollars, (B) for beer only, fifteen dollars per day;

(25) (A) University permit for beer only, two hundred forty dollars; (B) university permit for wine and beer only, five hundred sixty dollars, (C) university liquor permit, two hundred forty dollars;

(26) (A) Warehouse bottling permit, one hundred sixty dollars, (B) warehouse storage permit, thirty-five dollars;

(27) (A) Wholesaler permit, twenty-four hundred dollars, (B) wholesaler permit for beer only, eight hundred dollars;

(28) (A) Bowling establishment permit, two thousand dollars, (B) bowling establishment permit for beer only, three hundred fifty dollars or (C) racquetball facility permit, two thousand dollars;

(29) (A) Special outing facility permit, one thousand two hundred dollars, (B) special outing facility permit for beer only, two hundred forty dollars;

(30) (A) Nonprofit public television corporation permit, twenty-five dollars, (B) nonprofit corporation permit, twenty-five dollars;

(31) (A) Airport restaurant permit, twelve hundred dollars, (B) airport bar permit, three hundred dollars; (C) airport airline club permit, six hundred fifty dollars;

(32) Nonprofit golf tournament permit, two hundred dollars.

Sec. 5. Subsection (c) of section 30-91 of the general statutes is repealed and the following is substituted in lieu thereof:

(c) The sale or the dispensing or consumption or the presence in glasses or other receptacles suitable to permit the consumption of alcoholic liquor by an individual in places operating under a tavern permit OR MANUFACTURER PERMIT FOR A BREW PUB shall be unlawful on Saturday between two o'clock a.m. and nine o'clock a.m. and Sunday after two a.m. except on Christmas; and such sale or dispensing or consumption or presence in glasses or other receptacles in such tavern OR BREW PUB shall be unlawful on any other day between the hours of one o'clock a.m. and nine o'clock a.m. Any town may, by a vote of a town meeting or by ordinance, reduce the number of hours during which such sale shall be permissible or prohibit the sale of alcoholic liquor from twelve o'clock midnight on Saturday until two a.m. on Sunday or allow the sale of alcoholic liquor between the hours of twelve o'clock noon on Sunday and one o'clock a.m. on

Monday in places operating under a tavern permit OR MANUFACTURER PERMIT FOR A BREW PUB. In the case of any tavern OR BREW PUB wherein, under the provisions of this section, the sale of alcoholic liquor is forbidden on certain days or hours of the day, or during the period when a tavern permit OR MANUFACTURER PERMIT FOR A BREW PUB is suspended, it shall likewise be unlawful to keep such tavern or BREW PUB open to, or permit it to be occupied by, the public on such days or hours.

Sec. 6. This act shall take effect July 1, 1989

STATEMENT OF PURPOSE: To allow certain establishments to brew their own beer and sell it for on-premises consumption.

[Proposed deletions are enclosed in brackets. Proposed additions are all capitalized or underlined where appropriate, except that when the entire text of a bill or resolution or a section thereof is new, it is not capitalized or underlined.]

Co-Sponsors: REP. SCHIESSL, 60th DIST.